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ENVIRONMENTAL LAW CENTRE

The Environmental Law Centre (Alberta) Society is a non-profit charitable organization operating in Alberta since 1982. The society believes in making the law work to protect the environment and in support of this objective provides services in environmental law education and assistance, environmental law reform and environmental law research. The Society operates the Environmental Law Centre which is staffed by four full-time lawyers.

Funding is provided to the Society in part by the Alberta Law Foundation and through the generous support of the public. The Centre also accepts private and government research contracts for work relevant to and consistent with the Society's objectives.

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PREFACE

This is the 6th volume of the *Fisheries Pollution Reports* published by Environment Canada. Volume 6 includes Canadian court cases for 1992, 1993 and 1994 which consider one or more of sections 34-42, inclusive, of the *Fisheries Act*.

Volume 6 of the *Fisheries Pollution Report* was prepared by the Environmental Law Centre under contract to Environment Canada. The advice and support of Glenn Hamilton and David Noseworthy in the Regional Office of Environment Canada in Edmonton, and Paul Gavrel in the National Office of Environment Canada in Ottawa was appreciated. Both Rob Patzer and Ian Zaharko provided invaluable assistance.

The completion of Volume 6 of the *Fisheries Pollution Report* required the involvement of a number of Environmental Law Centre staff: Dolores Noga, librarian, Tammy Allsup, office manager, Debbie Lindskoog, secretary-receptionist and Shannon Keehn, summer research assistant. Without their professionalism and imagination, this project would not have been completed.

It was truly an honour to work on a project initiated so many years ago by my law school classmate, Michael J. Hardin.

Donna Tingley

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BRITISH COLUMBIA SUPREME COURT

[Indexed as: R. v. British Columbia]

Between Her Majesty The Queen in Right of The Province of British Columbia, Appellant, and Her Majesty The Queen, Respondent

Shaw, J.

Campbell River, April 3, 1992

***Fisheries Act*, R.S.C. 1985, c. F-14, ss 3(2), 36(3), 40(2)(b) – charge under s. 36(3) – conviction at trial – fine of $5,000 – issue on appeal whether Act binds the provincial Crown – plain meaning of s. 3(2) and objectives of the Act require provincial Crown to be bound – conviction upheld**

Summary: The Respondent was charged with violating s. 36(3) of the *Fisheries Act*, specifically by depositing or permitting the deposit of road primer in water frequented by fish, Hyacinthe Creek, or in a place or under conditions where it could enter such water. The Respondent was convicted at trial and fined $5,000. This is an appeal of the conviction based upon agreed facts.

The provincial Department of Transport was doing road improvement work on Quadra Island and spread liquid road primer over crushed gravel in preparation for the laying of asphalt paving. It rained before the asphalt was laid and the road primer was washed into Hyacinthe Creek which is a salmon spawning stream and water frequented by fish. It was agreed that the persons doing the work for the Department of Transport did not exercise due diligence to avoid commission of the offence.

The single issue in the appeal was whether the provincial Crown can be charged with an offence under the *Fisheries Act*. The learned justice agreed with the finding of the trial judge that the Crown is bound by the Act. Despite the common law presumption against imposing statutory liability on the Crown, a finding that the Crown was not bound would deny the plain meaning of s. 3(2) of the *Fisheries Act*. Further, the scheme of the *Fisheries Act*, which is intended to give far reaching protection to fisheries, requires the compliance of governments who are engaged in many activities that could harm fisheries. Attaching the stigma of conviction to the provincial Crown may have a deterrent effect and motivate public officials to take better care.

Held: Appeal dismissed

REASONS/MOTIF:

Harvey M. Groberman, Counsel for the Appellant
John D. Cliffe, Counsel for the Respondent

SHAW J.:-- Can the Provincial Crown be charged with an offence under the *Fisheries Act*, R.S.C. 1985, c.F-14? That is the question raised by this appeal from a conviction of Her Majesty the Queen in Right of the Province of British Columbia on the following charge:

> HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA, on or about the 11th day of October, 1988, at or near Quadra Island, in the Province of British Columbia, did unlawfully deposit or permit the deposit of a deleterious substance, to wit: road primer, in water frequented by fish, to wit: Hyacinthe Creek or in a place under conditions where the deleterious substance could enter such water, contrary to Section 36(3) of the *Fisheries Act* thereby committing an offence under Section 40(2)(b) of the *Fisheries Act*.

This is a test case based upon agreed facts. The facts are: On October 11, 1988, the Ministry of Transportation and Highways of the Province of British Columbia was improving the Village Bay Road on Quadra Island, and in doing so, spread liquid road primer over crushed gravel on the roadway. This was done in preparation for the laying of asphalt paving. During the night of October 11-12, and before the asphalt was laid, it rained on Quadra Island. The rain washed road primer out of the gravel and into Hyacinthe Creek, which is beside Village Bay Road. Hyacinthe Creek is a salmon spawning stream and is frequented by fish.

The road primer is called RM 20 and is composed of asphalt cement diluted with naphtha and kerosene. The section of road to which it was applied was approximately 1.3 kilometres in length and about 6 metres wide. Approximately 4550 litres of RM 20 were used.

The persons who did the work for the Ministry of Transportation and Highways did not exercise due diligence to avoid the commission of the offence charged.

The *Fisheries Act* forbids the deposit of deleterious substances in waters frequented by fish. Section 36(3) reads:

> (3) Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any such water.

Contravention of s. 36(3) is made an offence by s. 40(2)(b) which read at the time of the events here before the court:

> (2) Any person who contravenes any provision of
>
>> (b) subsection 36(3) is guilty of an offence and liable on summary conviction to a fine not exceeding fifty thousand dollars for a first offence, and not exceeding one hundred thousand dollars for each subsequent offence.

The position of the Provincial Crown (Her Majesty The Queen in Right of the Province of British Columbia) is that she is not a "person" within s. 36(3) or s. 40(2)(b) of the *Fisheries Act*.

The Federal Crown contends that the *Fisheries Act* expressly applies to all persons, including the Provincial Crown and the Federal Crown. The Federal Crown relies upon s. 3(2) which reads: (2) This Act is binding on Her Majesty in right of Canada or a province.

At trial in Provincial Court, His Honour Judge E.D. Schmidt held that the Provincial Crown was subject to prosecution under the *Fisheries Act*. He found the Provincial Crown guilty and imposed a fine of $5,000.00.

In my opinion, Judge Schmidt was correct in holding that the Provincial Crown can be prosecuted under the *Fisheries Act*. My reasoning for arriving at this opinion is as follows.

At the outset, I observe that counsel for the Provincial Crown advised the court that he takes no issue with the following propositions: that s. 3(2) is constitutionally valid; that Parliament has the power to subject the Provincial Crown to penal legislation; and Her Majesty the Queen in Right of the Province of British Columbia (the Provincial Crown) is a juridical entity.

The starting point of my analysis is that at common law the Sovereign can do no wrong. This broad principle immunizes the Crown, Federal and Provincial, from both civil claims and criminal prosecutions unless the Sovereign through Parliament or the legislatures enacts legislation which takes away the common law immunity. Crown immunity has been removed by both Federal and Provincial legislation with respect to civil liability. However, what this case must address is whether the *Fisheries Act* has removed Crown immunity to criminal prosecutions under the *Fisheries Act*. More precisely, does s. 3(2) in the context of the *Fisheries Act* accomplish that end?

I repeat s. 3(2):

> (2) This Act is binding on Her Majesty in right of Canada or a province.

The *Fisheries Act* sets out elaborate ways and means of protecting and enhancing fisheries as a resource. Regulations, inspections, permits, the provision of information, prosecutions, and remedial orders all fit together to provide a statutory scheme designed to protect and enhance fisheries.

The prohibition in s. 36(3) against the deposit of deleterious substances is clearly an important protection of fisheries provided by the *Act*. See *R.* v. *MacMillan Bloedel (Alberni) Limited* (1979), 47 C.C.C. (2d) 118 (B.C.C.A.); *Northwest Falling Contractors Ltd.* v. *The Queen* [1980] 2 S.C.R. 292 (2d) 353.

Section 36(3) employs the words, "no person shall". These words are found in many sections of the *Act*. So too, are expressions such as "any person who" and "every person who". The words in s. 40(2)(b) are "every person who contravenes". It is evident that the word "person" is fundamental to the framework of the *Act*.

Is the Queen for legal purposes a "person"? The *Fisheries Act* does not shed any light on this as it does not define "person". There is a partial definition of "person" in the *Interpretation Act*, R.S.C. 1985 c.I-21 s. 35(1). It says that "person" includes a corporation. The answer, however, is provided by the common law. According to the common law the Queen is both a physical person and a non-statutory corporation sole: *J.E. Verreault* v. *Fils Lté* v. *Attorney General of Quebec*,[1977] 1 S.C.R. 41 at 47; *Attorney General of Quebec* v. *Labrecque*, [1980] 2 S.C.R. 1057 at 1082; Attorney General of Canada v. Newfield Seed Ltd. (1989), 63 D.L.R. (4th) 644 at 660- 1 (Sask. C.A.). See also Crown Law, P.Lordon, Q.C., 1991, pp. 4-5.

In my opinion, s. 3(2) would be stripped of most of its obvious meaning if the word "person" in the Act were to be interpreted as not including the Crown. Governments are much involved in many activities that can harm fisheries. Some examples include bridge building, road building, sewage disposal, ferry systems, and many others. In my view it does not make sense to exempt the Crown from important provisions of the *Fisheries Act* when the plain language of s. 3(2) says that the Crown is bound by the Act.

That the scheme of the *Fisheries Act* is meant to give far reaching protection to fisheries is evident from the decision of the British Columbia Court of Appeal in *R.* v. *Richmond*, [1984] 4 W.W.R. 191. In issue was whether the Township of Richmond could be charged under the *Fisheries Act*. The court held that Richmond was subject to prosecution. Nemetz C.J.B.C. for the court said at page 192:

> In the first place, I look to the entire scheme of the Act. I think it is only common sense that Parliament in providing for the protection of waters from pollution intended that that should apply to all persons in Canada and could not, unless there was some specific language, exclude a municipal corporation. Otherwise that would mean that a municipal corporation would be able to pollute at will any waters coming within the purview of this all-embracing Act to protect the environment.

In *R.* v. *Forest Protection Ltd.* (1979), 25 N.B.R. (2d) 513 (N.B.S.C. App. Div.), the court considered the question of whether a Provincial Crown agency could be prosecuted under the former *Fisheries Act* R.S.C. 1970 c.F-14. Hughes C.J.N.B. for the court said, at page 530:

> The question now to be considered is what immunity from prosecution does the Crown in Right of the Province of New Brunswick possess in respect of prosecutions. . . for offences against the *Fisheries Act*. . .
>
> I have already set forth the text of s. 33(2) and s. 33(5) of the *Fisheries Act* which create the offences with which F.P.L. is charged. Section 71 of the Act reads:
>
>> 71. This Act is binding on Her Majesty in Right of Canada or a Province and any agent thereof.

> In my opinion, no other objective can be attributed to s. 71 than that Parliament intended to make the prohibitions contained in the Act applicable to the Crown both in the Right of Canada and the Provinces and any agent thereof. This interpretation would, of course, include F.P.L. as an agent of the Crown.

The above quoted s. 71 was the forerunner of the present s. 3(2) with the additional words "and any agent thereof". The statement of Hughes C.J.N.B. that the prohibitions in the *Act* are applicable to the Federal and Provincial Crowns (as distinct from agents thereof) is obiter dicta. Nevertheless, I give considerable weight to it, as he was clearly addressing himself to the question of Crown immunity from prosecution.

Counsel for the Federal Crown made reference to two cases involving statutes that comprised remedial schemes: *Saskatchewan* v. *Fenwick* (Prov. J.) [1983] 3 W.W.R. 153 (Sask. Q.B.) and *Procureur Général de Québec* v. *Nantel* (1984), 9 Admin. L.R. 11 (Que. S.C.). The statutes the cases dealt with were the *Saskatchewan Labour Standards Act* and the *Health and Safety at Work Act* of Quebec. Each statute expressly bound the Crown to its provisions. In both cases it was held that the Crown was thereby bound by the statute's penal provisions and could be prosecuted.

The Provincial Crown relied upon *Cain* v. *Doyle* (1946), 72 C.L.R. 409. The High Court of Australia addressed the issue of whether the Crown could be guilty of the commission of an offence under the *Re-establishment and Employment Act*, 1945, which prohibited the termination of employment of returning war veterans without reasonable cause. The Act provided that "employer" includes the Crown, "unless the contrary intention appears". Section 18(1) of the *Act* read in part:

> Where an employer has reinstated a former employee. . . he shall not. . . without reasonable cause, terminate the employment of that employee. . . . Penalty: One hundred pounds.

The court held by a 3 - 2 majority that the Crown was not subject to prosecution under s. 18(1). The court held that the Crown was bound by the duties in s. 18(1), but if it failed to carry out those duties, the words "Penalty: One hundred pounds" did not make the Crown amenable to prosecution. Dixon J. for two of the majority judges said at page 424:

> There is I think, the strongest presumption against attaching to a statutory provision a meaning which would amount to an attempt to impose upon the Crown a liability of a criminal nature. It is opposed to all our conceptions, constitutional, legal and historical. Conceptions of this nature are, of course, not immutable and we should beware of giving effect to the strong presumption in their favour in the face of some clear expression of a valid intention to infringe upon them. But we should at least look for quite certain indications that the legislature had adverted to the matter and had advisedly resolved upon so important and serious a course.

The third majority judge, Latham C.J., based his judgment upon the proposition that it is impossible for the Commonwealth to sue the Commonwealth and he interpreted the statute accordingly. As I noted earlier, in the present case the Provincial Crown advised the court that it does not take issue with the proposition that Parliament has the power to subject the Provincial Crown to penal legislation.

There were strong dissenting judgments in *Cain* v. *Doyle*. Starke J. said at page 421:

> The object of the *Re-establishment and Employment Act* is to provide for the reinstatement and preference in employment by the Commonwealth, the States and other employers, of persons who rendered war services. The obligations in respect of reinstatement and preference in employment are imposed upon Governments and private employers alike by the same sections and in the same words. And the penalty is attached to breach of the obligations thus expressed.
>
> Section 18 should be given its plain and ordinary meaning in the English language unless some gross or manifest absurdity is thereby produced. And in my judgment, as at present advised, there is no convincing reason for limiting the penalty prescribed by s. 18 to subjects.

Williams J. said at page 428:

> It is clear that the Crown must be expressly named or a necessary implication to that effect must appear in a statute before it can be bound in respect of its prerogatives, rights, immunities or property *(Minister for Works (W.A.)* v. *Gulson* (2); *Attorney-General* v. *Randall* (3). It is equally clear from the reiteration in the definitions of "employer" that the draughtsman of the *Re-establishment and Employment Act*, whatever its other shortcomings may be, fully appreciated the significance of this principle of construction and intended to involve the Crown up to the hilt.

Without expressing any view on the correctness of the decision of the majority in *Cain* v. *Doyle* on the statute there before the court, I am of the view that the reasoning of the two dissenting judges is the preferable approach to take for legislation of the nature of the *Fisheries Act*.

The Provincial Crown also relied upon *Canadian Broadcasting Corporation* v. *Attorney-General* for Ontario [1959] S.C.R. 188. In issue was whether CBC as a Crown Corporation could be prosecuted for carrying on business on a Sunday contrary to the *Lord's Day Act*. The court held by a 4 - 3 majority that CBC could not be prosecuted. The decision depended upon the meaning of "person" in the *Lord's Day Act*, which in turn referred to the definition of "person" in the *Criminal Code*. Although the *Criminal Code* defined "person" as including "Her Majesty and public bodies", the majority held that it was not the intent of the *Criminal Code* to make the Crown subject to prosecutions under the *Criminal Code* and therefore the scope of the *Lord's Day Act* should be similarly confined. Rand J. speaking for three of the majority judges said at page 617:

> To say that it intends and has effect to include the Crown as an ordinary subject of the prohibitory or the penal provisions of the *Code* is repugnant to the principle of immunity in both aspects. If such a fundamental change had been intended it would not have been effected by a clause of general definition.

The judgment of the fourth majority judge, Locke J. was to similar effect as that of Rand J.

Rand J. cited *Cain* v. *Doyle* but distinguished the statute there under consideration. He said in reference to that statute:

> The language of application was that "unless the contrary intention appears" the word "employer" included the Crown; and the "contrary intention" was found in the principle of immunity. (supra, p. 616)

Taschereau J. for the three dissenting judges said that clear, unambiguous language was necessary to overcome "deep seated" common law, but on his interpretation of the legislation, there was no ambiguity. In his opinion, CBC was subject to prosecution.

In my view, the *CBC* case is distinguishable. It involved quite different legislation, including a general definition drawn into the *Lord's Day Act* from the *Criminal Code*. The court was not addressing anything comparable to the scheme of the *Fisheries Act* and the quite specific wording of s. 3(2) of that *Act*.

Counsel for the Provincial Crown argued that it made no sense to subject the Crown to the penalty provisions of the *Fisheries Act* because the public would simply be paying fines to itself. While this prospect may appear unusual, I do not think that it is a compelling reason to depart from the clear words and intent of the *Fisheries Act*. Indeed there are reasons to the contrary. The fine itself, particularly its amount, is a mark of disapproval. Where the Provincial Crown is fined, the money will have to be paid to the Federal Crown. It is only in the case of the Federal Crown being convicted that the source and the recipient of the fine will be the same. What is more important is the stigma that is attached to being convicted and fined for a pollution offence. This must have a deterrent effect, and provide a spur to public officials to take care with their safety practices.

In conclusion, upon considering the objectives and the scheme of the *Fisheries Act* and the plain wording of s. 3(2) in the context of the *Act*, I am of the opinion that ss. 36(3) and 40(2)(b) of the Act are applicable to the Crown, both Provincial and Federal. I hold, therefore, that the Provincial Crown is subject to being prosecuted for violations of the Act.

The decision of Judge Schmidt is upheld and the appeal is dismissed.

ALBERTA COURT OF APPEAL

[Indexed as: *Kostuch (Informant) v. W.A. Stephenson (Western) Ltd.]*

Between Martha Kostuch, Respondent (Informant), and Her Majesty the Queen in Right of Alberta, W.A. Stephenson (Western) Limited and Sci Engineering and Constructors Inc., Appellants (Accused), and Attorney General of Alberta, not a party to the appeal

Lutz J., Bracco and Hetherington JJ.A.

Calgary, April 10, 1992

***Fisheries Act*, R.S.C. 1985, c. F-14, ss 35(1), 40(1)(a), 41 – charge by private informant under *Fisheries Act* – whether proceedings an abuse of process in light of similar proceedings in the past – appeal dismissed**

Criminal procedure – application for stay of proceedings – abuse of process – correct test for application for stay based on abuse of process is different from application to interfere with prosecutorial discretion to enter a stay – test is not flagrant impropriety

Summary: This appeal concerns a private information sworn on July 24, 1990, alleging offences under s. 35(1) of the *Fisheries Act* arising from the diversion of the waters of the Oldman River. The Appellants applied for an order staying the proceedings on the information on the ground of abuse of process, based on the history of six similar proceedings involving essentially the same parties.

The application was denied in the Provincial Court of Alberta on two grounds: one that the decisions of the Attorney General to enter previous stays rested on "imperfect bases", and two, the decision of the Attorney General of Canada that prosecutions against the accused under the *Fisheries Act* would not serve the interests of the proper administration of justice, did not *ipso jure* render a private prosecution an abuse of process.

The Appellants in this action sought an order in the nature of *certiorari* quashing the decision of the learned provincial court judge. The learned justice of the Court of Queen's Bench refused to issue the order requested. He found that the lower court decision had improperly brought the flagrant impropriety test from a situation where a court is asked to reverse a decision of an Attorney General to direct a stay of proceedings to a request for a stay. Nonetheless, the learned provincial court judge applied the correct test in rejecting the appellants' argument that the proposed prosecution was not in the interests of the administration of justice.

The learned justice also rejected the Appellants' arguments that the provincial court took into account irrelevant considerations being the Attorney General of Alberta's reasons for entering the stays and the Attorney General of Canada's reasons for not prosecuting.

This court was in agreement with the decision of the Court of Queen's Bench on each point. The correct test for an application for a stay of proceedings based on an abuse of process is not flagrant

impropriety. The correct test is whether a trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings. Because the Attorney General had entered stays in two previous cases did not mean that he would do the same in this case.

Held: Appeal dismissed.

REASONS/MOTIF:

I. Cartwright, Counsel for the Respondent
D.R. Thomas, Q.C. and A. Domes, Counsel for the Appellants (Accused), Her Majesty the Queen in Right of Alberta
R.H. Davidson, Counsel for the Appellants (Accused), W.A. Stephenson (Western)Limited and Sci Engineering and Constructors Inc.
I. Kirkpatrick, Counsel for the Attorney General of Alberta, not a party to the appeal

BRACCO J.A.:-- On the 24th of July, 1990, the respondent appeared before a justice of the peace and swore an information against the appellants. The information alleged that on every day from the 25th of July, 1988, to the 24th of July, 1990, near Pincher Creek, Alberta, the appellants

> "did carry on a work or undertaking that resulted in the harmful alteration, disruption, or destruction of fish habitat to wit: by diversion of the waters of the Oldman River, contrary to Sections 35(1), 40(1)(a) and 41 of the *Fisheries Act*, R.S.C. 1985, F-14."

The appellants applied before Judge Fradsham, a Provincial Court judge, for an order staying proceedings on this information on the ground of abuse of process. Judge Fradsham dismissed this application ((1991), 78 Alta.L.R. (2d) 131). The appellants then applied before Associate Chief Justice Miller of the Court of Queen's Bench for an order in the nature of *certiorari* quashing the decision of Judge Fradsham. Associate Chief Justice Miller dismissed this application ((1991), 81 Alta. L.R. (2d) 214; supplementary reasons at (1991), 82 Alta. L.R. (2d) 375). This appeal ensued.

Counsel for the respondent argued before us that Associate Chief Justice Miller could review the decision of Judge Fradsham for jurisdictional error only. He relied on the case of *R.* v. *Dubois* (1986), 25 C.C.C. (3d) 221 (S.C.C.). However, we need not decide this issue. Associate Chief Justice Miller dealt with both errors of law and jurisdiction, and in our view he was correct in refusing to quash Judge Fradsham's decision. It does not matter, therefore, whether he was only entitled to review for errors of jurisdiction. The result would have been the same if he had dealt only with these errors.

We will not attempt to repeat here the very careful analysis of the facts and the law made by both Judge Fradsham and Associate Chief Justice Miller. Their judgments have been reported. We will summarize the facts and describe the conclusions of each judge.

The appellants base their allegations of abuse of process on the history of similar proceedings involving substantially the same parties. The respondent has on six previous occasions sworn informations alleging offences under the *Fisheries Act*. On one occasion she left an information unsworn. The informations allege identical offences. Only the dates of the alleged offences differ.

In relation to an information dated August 2, 1988, a justice of the peace issued summonses to compel the attendance of the accused in Provincial Court. However, the Attorney General entered a stay of the proceedings. He advised the respondent's counsel that this was to permit the appropriate enforcement agency to conduct an investigation into the allegations of the respondent. The Attorney General then asked that the Royal Canadian Mounted Police investigate the respondent's complaints.

On the 4th of May, 1990, the respondent swore another information. On the 1st of June, 1990, a Provincial Court judge issued summonses to compel the appellants to attend in Provincial Court in relation to this information.

On the 10th of July, 1990, the Minister of Justice and Attorney General of Canada announced that her department would not conduct any prosecutions under the *Fisheries Act* in connection with the construction and operation of the river diversion tunnels at the Oldman River. The justice communique issued on that day said that the R.C.M.P. had conducted a comprehensive investigation and did not recommend proceedings by way of prosecution. It also said that

> "In reaching her decision, the Attorney General noted that Alberta had implemented a mitigation program designed to address environmental consequences of the project. She took into account, as well, the intent of the Government of Canada to subject the construction project to public review under the Environmental Review Process." (AB 325)

The Attorney General said that she did not believe that proceedings by way of prosecution "would serve the interests of the proper administration of justice".

On the 11th of July, 1990, counsel instructed by the Attorney General of Alberta directed the Clerk of the Provincial Court to enter a stay of proceedings in relation to the information sworn on the 4th of May, 1990.

It is important to note that the Attorney General of Alberta has not intervened in any way in the proceedings initiated by the information sworn on the 24th of July, 1990, -- the information with which we are concerned. Mr. Kirkpatrick appeared before us as counsel for the Attorney General to make this clear. The Attorney General has neither intervened nor expressed an intention to intervene.

Judge Fradsham dismissed the application of the appellants for a stay of proceedings. He found first that while the Attorney General had the right to stay any proceedings of which he had conduct, the court had authority "to permit a private prosecution in the face of the actions of the Attorney-General if there is sufficient support for the suggestion that the Attorney-General is attempting to thwart a proper prosecution" (at 144). In his opinion the decisions of the Attorney General of Alberta to enter the stays described above, rested on "imperfect bases" (at 147). He therefore rejected the appellants arguments that it would be an abuse of process to permit further prosecution of the appellants in the face of the earlier stays entered by the Attorney General (at 147).

Second, Judge Fradsham decided that the conclusion of the Attorney General of Canada that prosecutions under the *Fisheries Act* would not serve the interests of the proper administration of justice, did not *ipso jure* render a private prosecution under the *Act* an abuse of process. In his opinion the prosecution of the appellants by the respondent was a very proper use of the process. He therefore dismissed the application of the appellants (at 152).

Associate Chief Justice Miller found (at 218 - 224) that Judge Fradsham had failed to distinguish between two types of proceedings: the first, where the court is asked to reverse a decision of the Attorney General to stay proceedings; and the second, where the court is asked to stay proceedings. In the first type Associate Chief Justice Miller said that courts have been reluctant to interfere with the discretion of the Attorney General unless there has been clear evidence of flagrant impropriety. This is the test to be applied. In the second a stay may be entered where it is very clear that "compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings." (*R*. v. *Jewitt* (1985), 21 C.C.C. (3d) 7 (S.C.C.) at 14.)

Associate Chief Justice Miller found that Judge Fradsham had erred in law in introducing into a case concerning an application for a stay, the flagrant impropriety test appropriate in determining whether to lift a stay. However, he concluded that Judge Fradsham had applied the correct test in rejecting the appellants' argument that the proposed prosecution was not in the interests of the administration of justice.

Associate Chief Justice Miller rejected (at 224 - 226) the argument of the appellants that Judge Fradsham exceeded his jurisdiction by taking into account irrelevant considerations, in particular,-- the Attorney General of Alberta's reasons for entering the stays described above; and-- the reasons behind the decision of the Attorney General of Canada not to prosecute under the *Fisheries Act*.

Associate Chief Justice Miller found that the Attorney General of Alberta's reasons for entering the stays were relevant to the question of whether further steps in the proceedings before him would constitute an abuse of process. He also found that in considering the reasons of the Attorney General of Canada for not prosecuting, Judge Fradsham focused his inquiry correctly on the interests of the administration of justice.

For these reasons Associate Chief Justice Miller refused to quash Judge Fradsham's decision.

We agree with Associate Chief Justice Miller that the flagrant impropriety test is not appropriate in the circumstances of this case. In applying this test Judge Fradsham relied primarily on the following cases:

R. v. *Weiss* (1915), 23 C.C.C. 460 (Sask. S.C.)

R. v. *Edwards* (1919), 31 C.C.C. 330 (Alta. S.C.)

R. v. *Leonard*, Ex parte Graham (1962), 133 C.C.C. 230 (Alta. S.C.T.D.), aff'd (1962), 133 C.C.C. 262 (Alta. S.C.A.D.)

However, these cases are not analogous to the one before us.

In each of these cases a private prosecutor sought to reverse a decision of an attorney general to terminate or suspend prosecution. In the case before us, so far as we know, the Attorney General of Alberta has made no decision, unless it can be said to be a decision not to intervene at this time. The appellants do not seek to reverse a decision of the Attorney General. They seek a stay to remedy what they say is abuse of process.

We do not think that the fact that the Attorney General has on two previous occasions entered stays can be taken as an indication that he will do so in this case. His failure to intervene or express any intention to intervene suggests the contrary.

The flagrant impropriety test which can be extracted from the cases relied on by Judge Fradsham is not, therefore, appropriate in this case. The correct test is the test for abuse of process described above. This is the test that Judge Fradsham applied in the second part of his judgment. After applying this test, Judge Fradsham found that permitting the prosecution before him to continue would not constitute abuse of process. Since he applied the right test, there is no ground for interfering with this conclusion.

We agree as well with Associate Chief Justice Miller in rejecting the argument that Judge Fradsham relied on irrelevant considerations. Certainly he had to take into account the reasons for the stays entered by the Attorney General of Alberta. In relation to his analysis of the justice communique issued by the Attorney General of Canada, it is clear that his inquiry was eventually brought into focus. He said (at 149)

> "Of what consequence is all this to my function as a judge? .... my purpose in considering the communique in the depth that I have is to determine the question which is properly before me: May Dr. Kostuch continue a prosecution which the Dominion Attorney-General has stated, at least impliedly, would not serve the administration of justice?"

No objection can be taken to this statement of the issue before Judge Fradsham. We agree with Associate Chief Justice Miller that Judge Fradsham did not take into account irrelevant considerations.

Therefore, Judge Fradsham did not make a jurisdictional error. He did err in law in that he first applied the wrong test for abuse of process. Subsequently he applied the correct test and concluded that the proceedings before him did not constitute abuse of process. There is no ground for interfering with that decision.

We therefore dismiss this appeal.

FEDERAL COURT OF APPEAL

[Indexed as: Carrier-Sekani Tribal Council v. Canada (Minister of the Environment)]

Between Alcan Aluminium Limited, Minister of the Environment, Minister of Indian Affairs and Northern Development, Minister of Fisheries and Oceans and Minister of Transport, Appellants, and Carrier-Sekani Tribal Council and als.*, Respondents And Between Alcan Aluminium Limited, Minister of the Environment, Minister of Indian Affairs and Northern Development, Minister of Fisheries and Oceans and Minister of Transport, Appellants, and Save the Bulkley Society, Nechako Neyenkut Society, United Fishermen and Allied Worker's Union, B.C. Wildlife Federation, The Steelhead Society of British Columbia and Canadian Association of Smelter and Allied Workers, Respondents

* See list of other Respondents appended to the judgment

Heald, Marceau and Linden JJ.

Vancouver, May 8, 1992

***Fisheries Act*, R.S.C. 1985, c. F-14 (as amended), s. 20(10) (now 22(3)), s. 33.1(3)(b) (now37(3)(b)) -- an opinion letter by the Minister under s. 22(3) is not a decision which triggers the EARP Guidelines Order – the discretionary power to request information under s. 37(2) to assist the Minister in a legislative function is not a decision triggering the Environmental Assessment and Review Process**

***Navigable Waters Protection Act*, R.S.C. 1985, c. N-22, s. 5(2), s. 10(2) – an exemption under this section is in fact an acknowledgement of a finding of fact – an exemption does not constitute a decision under the EARP Guidelines Order – an approval under s. 10(2) is of the same type as an exemption under s. 5(2) – settling litigation is not undertaking any affirmative regulatory duty established by Parliament**

***Department of the Environment Act*, R.S.C. 1985, c. E-10, s. 6 – power to adopt regulations or enactments necessarily includes the power to clarify, amend or vary those enactments subsequently – no bad faith if purpose of the *Act* not breached**

Defences -- Legitimate Expectation – doctrine applies to administrative procedure, not validity of legislative enactment

Summary: This is an appeal and cross-appeal of a decision of a motions judge in the Trial Division which issued various orders in the nature of certiorari and mandamus. The action arose as a result of a Settlement Agreement between the Queen in Right of Canada, the Queen in Right of British Columbia and Alcan terminating litigation concerning the scope of the Minister of Fisheries and Oceans' powers to control flows on the Nechako River under the *Fisheries Act*, R.S.C. 1985, c. F-14 in respect to Alcan's hydro-electric and aluminum reduction facilities. Following the conclusion of the Settlement Agreement, the Minister of Fisheries and Oceans issued an opinion

under s. 20(10) of the *Fisheries Act* that current water flows associated with the Kemano Completion Project ("KCP"), the second phase of Alcan's facility, and the flows associated with KCP were sufficient for the safety and spawning of fish provided certain actions were undertaken. Subsequently, the Governor in Council passed an Order under s. 6 of the *Government Organization Act* approving the Settlement Agreement and an Order under s. 33.1(3)(b) (now s. 37(3)(b)) of the *Fisheries Act* directing the Minister of Fisheries and Oceans to exercise his powers under s. 33.1(3)(b) (now s. 37(3)(b)) consistently with the Settlement Agreement and his written opinion. At a later date, the Governor in Council passed, on the recommendation of the Minister of the Environment, the Kemano Completion Project Guidelines Order exempting KCP from the Environmental Assessment and Review Process Guidelines Order.

The relief sought in the originating applications was granted by the learned motions judge: orders in the nature of certiorari quashing and setting aside the execution of the Settlement Agreement by the Minister of Fisheries and Oceans; the decision of the Minister of Fisheries and Oceans under s. 20(10) of the *Fisheries Act*; the various Declarations of Exemption and the Approval issued by the Minister of Transport under the *Navigable Waters Protection Act*; and the Kemano Completion Project Guidelines Order. Also granted was an order in the nature of mandamus requiring the respondent federal ministers to comply with the Environmental Assessment Review Process Guidelines Order. This decision was appealed to the Federal Court of Appeal. The cross-appeal filed by the Tribal Council alleged the Kemano Completion Project Guidelines Order to be ultra vires the additional ground that it was inconsistent with consitutionally protected native rights.

The appellants raised three arguments against the decision of the learned motions judge. First, it was argued that the motions judge erred in refusing to strike out paragraph 5 of the originating motions, concerning the Kemano Competion Project Guidelines Order. The court agreed with the appellants' assertions; that a proceeding challenging an order of the Governor in Council must be directed to the Attorney General; that an order passed in exercise of a legislative function is not reviewable by certiorari; and in any event, the relief sought is only available in proceedings commenced by way of action.

Second, it was argued by the appellants that their inability to address the issues raised by the originating motions breached the basic principles of natural justice. The court found that upholding the conclusions of the learned trial judge would deprive the appellants of their right to place before the court all means of defence.

The court also agreed with the third of the appellants' arguments; that the Environmental Assessment Review Project Guidelines Order did not apply to the impugned Ministerial decisions made in relation to the KCP. Consistent with the decision of the Supreme Court of Canada in *Friends of the Oldman River Society* v. *Minister of Transport et al.* which concluded that the application of the Guidelines Order requires a "proposal" which requires an "initiative, undertaking or activity for which the Government of Canada has a decision making responsibility", the court found that none of the ministerial actions in question constituted decisions made in the exercise of a federal minister's decision-making responsibility under the Environmental Assessment Review Process Guidelines Order. If they did, the Kemano Completion Project Guidelines Order disposed of the matter. As to whether the Order was passed contrary to s. 35 of the *Charter*, the court determined that in order for the argument to succeed, one would need to be aware of the nature of the governments fiduciary duty to aboriginals and the fact that the fulfillment of that duty would require the application of the Order to the KCP.

The cross appeal was denied on the procedural grounds that under Rule 1203 of the *Rules of the Court* a cross-appeal must be directed at the decision itself, not the reasons therefor.

Held: The appeals were allowed and the cross-appeal dismissed.

REASONS/MOTIF:

Brian J. Wallace, Counsel for the Appellant
Harry Wruck, Counsel for the Appellant, Minister of the Environment
Martin Pallenson, Counsel for the Respondent, Save the Bulkley Society

The judgment of the Court delivered by

MARCEAU J.:-- Two appeals and a cross-appeal are before the Court. They are all directed against a decision of a motions judge in the Trial Division issuing various orders in the nature of certiorari and mandamus. At the root of the proceedings is the construction of the so-called Kemano Completion Project, the second phase of Alcan Aluminium Limited's ("Alcan") hydro-electric generation facilities and aluminum reduction facilities in west-central British Columbia. Several parties are involved in the proceedings. On one side, with Alcan, are four ministers of the Federal Crown: Environment, Fisheries and Oceans, Transport, Indian and Northern Affairs ("appellant Ministers"), who are said to have illegally allowed the Project to proceed. On the other side stand the Carrier-Sekani Tribal Council and the Chiefs of eleven Carrier Indian Bands representing themselves and their members ("the Tribal Council"), together with a coalition of environmental and fishing interests led by the Save the Bulkley Society ("the Save the Bulkley Society"), who attack the Ministers' actions and seek a federal environmental review of the Project. The issues are numerous and complex and, to be properly addressed, they need to be carefully put in context. This will require a complete review of the facts that have led to the litigation and a history of the proceedings themselves.

* * *

Factual Background

The Existing Facilities

In 1950, Alcan reached an agreement with the government of British Columbia relating to the construction of hydro-electric and aluminum reduction facilities in west-central British Columbia. The company was given the right to store and direct water flows in the Nechako and Nanika Rivers. Prior to commencing construction of the first phase of its project, the company held discussions with the federal Department of Fisheries that culminated in 1952 with the Minister's determination that minimum water flows could be met by the release of 100 cubic feet per second into the Nechako River through a spillway to be dug at Skins Lake.

Work was completed in 1967. The essential feature of these primary facilities was a dam (the Kenney Dam) controlling the flow of the eastward running Nechako River which permitted the storage of a large quantity of water in a reservoir (the Nechako Reservoir) and the diversion of some of it westward to a powerhouse at Kemano whose function was to supply electricity to an aluminum smelter plant at Kitimat.

The Project of Expansion of the Facilities

During the 1970's, Alcan developed a plan for the second phase of its facility which called for the expansion of its capacity to store and divert water from both the Nechako and Nanika Rivers. The plan came to be known as the Kemano Completion Project or the KCP.

The Dispute with the Federal Authorities

In 1979, the federal Department of Fisheries and Oceans became concerned about the level of water released into the Nechako River from the existing facilities, particularly through the Skins Lake spillway. When Alcan disputed the validity of the Department's analysis, the Attorney General of Canada commenced an action in the Supreme Court of British Columbia and obtained a mandatory injunction forcing the company to meet certain water flows. Alcan opposed the action and filed a counterclaim. The Attorney General of British Columbia was then joined as a defendant. As time passed, Alcan, in 1983, determined to go ahead with the KCP in spite of the pending action, applied for an energy project certificate pursuant to the provincial *Utilities Commission Act*, S.B.C. 1980, c. 60. Alcan later postponed its application and, in an attempt to come to a full agreement with the federal authorities, submitted, for the Department's consideration, water flow studies it itself had conducted.

While the litigants were attempting to resolve their dispute, other parties indicated an interest in the matter. In 1984, the Tribal Council advised the Minister of Indian Affairs that the management of the Nechako River system would be a central issue in their forthcoming land claim negotiations. In June 1985, after Alcan filed a revised counterclaim, the Tribal Council even sought to be added as a party to the pending action but were eventually denied by the British Columbia Court of Appeal on the ground that the litigation dealt with a constitutional question, the resolution of which could not impair the legal position of the *Indians [Canada (A.G.)* v. *Aluminium Co. of Canada*, (1987) 10 B.C.L.R. (2d) 371 (C.A.).].

The action finally came to trial in August 1987. The main issue was the scope of the Minister of Fisheries and Oceans' power to control flows on the Nechako River under the *Fisheries Act*, R.S.C. 1985, c. F-14; there were also some subsidiary issues, such as the quantity of water actually released and the level of flow required for the protection of the fish.

The Settlement of the Litigation

On September 14, 1987, at the beginning of the third week of the trial, the three parties to the action, the Queen in Right of Canada, the Queen in Right of British Columbia and Alcan, reached an agreement ("the Settlement Agreement") that effectively terminated the litigation. Alcan gave up the rights conferred on it in 1950 to dam and direct the flow into the Nanika River watershed as well as its rights to certain portions of the flow of the Nechako River; it also undertook to construct facilities that would enhance water quality in the river and promote the preservation of fish. In return, Alcan ensured the establishment of clear standards for the local fisheries resource, something it needed to complete its expansion; and, to that effect, an opinion was immediately issued by the Minister of Fisheries and Oceans, pursuant to subsection 20(10) of the *Fisheries Act*, stating that, provided certain remedial measures were taken, current water flows and the flows associated with KCP in the Nechako River would be sufficient for the safety and spawning of fish [This is one of the Ministers' actions to be reviewed, so I will come back to it later.]. It was also agreed that a committee formed by representatives of each of the three parties would have the responsibility of supervising and managing water flows on the Nechako River.

On December 10, 1987, the Governor in Council issued Orders in Council P.C. 1987/2481 and 1987/2482. The first Order, passed pursuant to section 6 of the *Government Organization Act*, 1979, approved the Settlement Agreement; the second Order, passed pursuant to paragraph 33.1(3)(b) (now paragraph 37(3)(b)) of the *Fisheries Act*, directed the Minister to exercise his powers under subsection 33.1(2) (now subsection 37(2)) of the *Act* in a manner consistent with the Settlement Agreement and the written opinion he had given under section 20(10) of the said *Act*.

The Aftermath of the Settlement Agreement

On April 14, 1988, an action was commenced in the Federal Court by the Save the Bulkley Society and other plaintiffs, directed against Her Majesty the Queen in Right of Canada, the Minister of Fisheries and Oceans and the Attorney General of Canada, challenging the validity of the Settlement Agreement.

An amendment to the Statement of Claim filed on June 8, 1988 alleged that the Settlement Agreement was invalid on the grounds inter alia that it constituted an unlawful delegation and/or fettering of the Minister of Fisheries and Oceans' discretion under the *Fisheries Act*. Alcan obtained approval to be added as a defendant in the litigation and filed its Statement of Defence on May 5, 1989. Since then, the plaintiffs have taken no further steps in the action.

On August 10, 1988, Alcan, now in possession of the necessary provincial authorization, announced its intention to proceed with the expansion of its power generating facilities. In due course, construction of the KCP commenced in the fall of 1988.

Certain of the works associated with the KCP involved construction in or across navigable waters. With respect to those works, the Minister of Transport issued, during 1988 and 1989, a series of "exemption orders" pursuant to subsection 5(2) of the *Navigable Waters Protection Act*, R.S.C. 1985, c. N- 22. One other work called for modifications to the existing spillway, and with respect to it the Minister of Transport also issued an "approval" under subsection 10(2) of the same *Act* [They too will be discussed later.].

On October 12, 1990, the Governor in Council passed, as recommended by the Minister of the Environment on October 4, 1990, the Kemano Completion Project Guidelines Order ("SOR/90-729"). This Order provided that the environmental regulations, enacted pursuant to section 6 of the *Department of the Environment Act*, R.S.C. 1985, c. E-10, by Order in Council SOR/84-467 and called the Environmental Assessment and Review Process Guidelines Order (the "EARP Guidelines" or the "Guidelines Order") did not apply to the KCP. It is often referred to as the "Exemption Order".

Construction of the KCP proceeded as planned until June 1991 when, as a result of the decision rendered by the motions judge in the present proceedings, Alcan moved to suspend work until such time as the appeal litigation is finally settled. By then, a large part of the project had been completed.

Procedural Background

The proceedings now before the Court were commenced in October 1990. The Save the Bulkley Society were the first to file their originating motion on October 5; the Tribal Council filed theirs on October 11. Both groups, dissatisfied with the response of the Ministers to their requests for a full environmental review of the KCP, were moving against the Ministers seeking orders quashing the Settlement Agreement and the aforementioned ministerial actions taken under the *Fisheries Act* and the and enjoining a full environmental review of the KCP, pursuant to the EARP Guidelines. On November 5, 1990, the parties consented to a hearing on February 26, 1991.

There was no reference to SOR/90-729, the Exemption Order, in the applications and Alcan was not a party to them. On January 17, 1991, both the Tribal Council and the Save the Bulkley Society (the respondents herein) amended their respective originating motions with a view to adding to the list of orders sought one quashing SOR/90-729. A few days later, Alcan made an application to be joined as a respondent, which was granted.

In answer to the originating motions, Alcan and the Ministers (the appellants herein) filed a number of preliminary motions contending that the applications should be struck or, at least, that the hearing be postponed. On February 18, 1991, the motions judge, before whom the matter came, determined that it was preferable to adjourn the hearing to a special session to be held on February 26, 1991, at the outset of which the preliminary objections would be dealt with.

Accordingly, on February 26, 1991, the motions judge had before him the two originating motions for prerogative relief made by the Save the Bulkley Society and the Tribal Council and the two preliminary motions to quash or postpone of the Ministers and Alcan.

In the originating motions, the relief sought, in spite of some variations in the wording, was to the same effect:

> (a) An Order in the nature of certiorari quashing and setting aside the execution by the Minister of Fisheries and Oceans of the Settlement Agreement;
>
> (b) An Order in the nature of certiorari quashing and setting aside the decision of the Minister of Fisheries and Oceans made pursuant to subsection 20(10) of the *Fisheries Act*;

(c) An Order in the nature of certiorari quashing and setting aside the following Declarations of Exemption and an Approval issued by the Minister of Transport pursuant to the *Navigable Waters Protection Act.*

> (i) Declaration of Exemption dated June 22, 1989, File No. 8200-T-3489.1; (ii) Declaration of Exemption dated July 24, 1989, File No. 8200-T-7558-1; (iii) Declaration of Exemption dated September 26, 1989, File No. 8200-T- 7560-1; (iv) Declaration of Exemption dated December 15, 1989, File No. 8200-T- 2768.2; (v) Approval dated February 19, 1990, File No. 8200-4560.

(d) An Order in the nature of mandamus requiring the respondent Ministers of Fisheries and Oceans, Transport, Indian Affairs and Northern Development, and Environment to comply with the EARP Guidelines and to subject the decisions noted in paragraphs (a) to (c) above to an environmental screening and assessment pursuant to section 10 of the EARP Guidelines.

(e) An Order in the nature of certiorari quashing and setting aside the Kemano Completion Project Guidelines Order SOR/90- 729.

In the preliminary motions, it was submitted principally that the relief sought by the Save the Bulkley Society and the Tribal Council was not available on the applications as they stood, the Ministers contending that none of the orders contemplated could be issued while Alcan only challenged one, namely that related to the quashing of Order in Council SOR/90- 729. It was submitted, alternatively, that a trial on the issues should be heard, or at least an adjournment of this hearing granted, so as to permit Alcan and the Ministers to submit their own evidence addressing the allegations contained in the voluminous material filed in support of the originating motions.

A transcript of the three day hearing is on file. At its conclusion, judgment was reserved.

On May 14, 1991, the learned motions judge handed down his decision: the preliminary motions to quash were denied and all the relief sought in the originating applications was granted. Appeals to this Court were immediately launched.

A cross-appeal, as I mentioned at the outset, was also filed with this Court. The Tribal Council regretted that the motions judge had not added to the grounds on which he had found the Order in Council SOR/90-729 to be ultra vires the additional alleged ground that it was inconsistent with some constitutionally protected rights of the native people pursuant to section 35 of the *Constitution Act*, 1982. It was extremely doubtful that such procedure was open to the cross-appellant as a cross-appeal must be directed at the decision itself, not the reasons therefor (see Rule 1203 of the Rules of the Court). Besides, in the appeals themselves, the validity of the judgment a quo would have to be confirmed with respect to all the grounds raised in the originating motions. In any event, the cross-appeal was never pursued independently of the appeals.

The appeal hearing lasted seven and a half days, five in December 1991 and two and a half in April 1992, during which every facet of all the legal problems arising were thoroughly addressed and discussed by a battery of first-class counsel. The written arguments covered hundreds of pages.

Some of the discussion had to be reopened after the Supreme Court of Canada, on January 23, 1992, handed down its long awaited judgment in the case of *The Queen et al.* v. *Friends of the Oldman River Society et al.* which was at the heart of all presentations and ought to be the primary governing authority for the disposition of the originating motions.

I see no reason, in these reasons for judgment, to review and discuss at length each and every submission made. After analysis and reflection, I have come to the view that if I have grasped the facts properly and if my understanding of the legal principles involved, particularly the teachings of the Supreme Court in the Oldman River case, is correct these appeals can be disposed of on the basis of arguments less complex and involved than the extended and knowledgeable presentation of counsel would make one believe. I intend to carefully limit myself to stating my conclusions and explaining clearly, but as briefly as possible, the approach and legal reasoning that support them.

* * *

The appellants place their several grounds of attack against the motions judge's decision under three general allegations. First, they say that the motions judge erred in refusing to strike out paragraph 5 of the originating motions. Second, they contend that, in deciding to immediately consider the originating motions, the motions judge denied them a full and fair hearing. Third, they submit that, in any event, the relief sought in the originating motions could not be granted. While each allegation may lead to the granting of the appeal, obviously each of them do not have the same scope and, thus, cannot lead to the same final disposition. Each must be analysed separately but, in view of my conclusion on the third one, I will deal with the first two quickly.

I

Paragraph 5 of each of the originating motions sought an order quashing SOR/90-729. In the application of the Tribal Council, it reads as follows:

> (5) To the extent necessary, an order in the nature of certiorari quashing and setting aside the Kemano Completion Project Guidelines Order, S.O.R./90-729, on the grounds that it is ultra vires Section 6 of the *Department of the Environment Act*; or it was made in bad faith because it breached fiduciary duties the Respondents owed to the Applicants, to comply with S.O.R./84-467 before taking decisions or actions which might adversely affect Applicants' rights or interests; or it is inconsistent with the recognition and affirmation of the Applicants' existing aboriginal rights in Section 35 of the *Constitution Act*, 1982.

In the application of the Save the Bulkley Society, the same relief was sought but set out differently:

> (5) An order in the nature of certiorari quashing and setting aside the Kemano Completion Project Guidelines Order, SOR/90-729 for breach of the duty of fairness.

The appellants contend that an order of the Governor in Council could be the subject of a judicial attack only in a proceeding directed against the Attorney General; that such an order passed in the exercise of a legislative function is not reviewable by certiorari; and that, in any event, the relief sought, which is really a declaration, is only available in proceedings commenced by way of action. I think that each of these three procedural objections has validity. There is no doubt that the Ministers against whom the proceedings are directed do not and cannot act as the legal representatives of the Governor in Council. The Deputy Attorney General appeared and acted for the respondent Ministers, as it was his legal responsibility to do, but he was not there on behalf of the Attorney General of Canada and even less so on behalf of the Cabinet and the Governor in Council. It is clear to me also that, however broad its scope may have become, certiorari is a common law remedy which was developed and still exists to review administrative determinations or decisions, not legislative prescriptions. And above all, it is well established that the summary procedure of originating motion can only be used to seek a prerogative writ, not a declaratory remedy.

The respondents' reply that what is really challenged is the recommendation of the Minister of the Environment which resulted in the adoption of the Order in Council rather than the Order itself is, in my view, of no avail. The recommendation of the Minister has no force of law in itself and cannot be isolated and challenged independently of the Order in Council which is the only legal instrument to which effect can be given. Likewise, it is no answer to say that the objections are not substantive, as if we were dealing with a usual motion to quash directed against a statement of claim and based on the contention that the allegations made reveal no reasonable cause of action. The objections are indeed of a procedural nature, but it would be a mistake to look at them as being merely technical as some basic requirements of the proper administration of justice are directly involved. The importance and possible consequences of a challenge to the validity of an Order in Council are too great to permit it to be done via a short-circuited route and without all the normal procedural safeguards. And finally, it is specious to argue that no formal declaration was sought or made. The Order in Council was being challenged on the basis that it was ultra vires, enacted in bad faith and contrary to section 35 of the Constitution; a court order giving effect to any such challenge is certainly declaratory in nature.

In my judgment, therefore, the objections raised by the appellants as to the availability of the relief sought in paragraph 5 of the amended originating motions are all valid. Does it follow that the motions judge had no choice but to strike out in both applications the impugned paragraph? I do not think so. The usual motion to strike made pursuant to Rule 419 of the Rules of the Court and directed against an action will normally lead to the dismissal of the proceeding. But, as pointed out before, the preliminary motions here were only analogous to Rule 419 motions; they were not based on the proposition that the respondents herein had obviously no right to obtain the relief they were seeking, but merely that they had resorted to an inappropriate procedure. If it was possible to correct the situation by ordering that certain measures be taken, and no doubt that was the case, the striking out of the impugned paragraph would not only be unnecessary but could amount to a wrong remedy. What remains undeniable, however, is that the appellants are entitled to say that the motions judge could not, on the sole basis of the procedure before him, grant, as he did, the relief sought in paragraph 5 of the two originating motions.

II

The appellants, as I said, do not leave it at that. They submit that the motions judge could not grant, as he did, any of the relief sought in the originating motions without breaching the most basic principle of natural justice. They refer to the transcript of the proceedings to show that the hearing was devoted exclusively to the preliminary motions to strike, following a determination that the originating motions themselves would be referred to the Associate Chief Justice for scheduling, a referral which would have allowed them to file material and to cross-examine on the affidavits relied on by the respondents herein. They did not address the issues raised by the originating motions, they say, and they were given no opportunity to do so. What apparently happened is that, following the completion of the hearing and during the course of his deliberations, the learned motions judge came to the conclusion that he could deal with the substantive issues, despite not having heard from counsel in respect thereto, since all the material necessary to establish the factual background supporting the originating motions was already on file and to do so immediately would preclude further expensive and lengthy proceedings.

Counsel for the respondents do not deny that the issues raised by the originating motions were not squarely addressed at the oral hearing. They contend, however: first, that Alcan had dealt with these issues in their written submission filed prior to the hearing and that the federal Ministers had only themselves to blame if they had failed to do so contrary to the requirements of Rule 321.1; second, that the issues were almost entirely ones of law requiring little reference to factual material; and third, that the motions judge had the jurisdiction and the discretion to make immediate decisions and, in the context of the case as a whole, he had valid grounds to so exercise his discretion.

With respect, I disagree with counsel for the respondents. It seems clear to me, in reviewing the transcript, that the procedures adopted below may have had the effect of depriving the appellants of a complete and fair hearing. The audi alteram partem rule is, of course, too fundamental to be tampered with for the sake of saving time and money. The appellants are right when they say that the motions judge was not entitled to grant the orders sought in the originating motions before they had been afforded a full opportunity to present their case.

This natural justice argument acquired even further substance in the course of the appeal hearing. In their amended Notices of Motion, the respondents had listed among the several ministerial decisions for which they were seeking certiorari a certain Approval dated February 19, 1990 granted to Alcan pursuant to the *Navigable Waters Protection Act*. During the hearing in the court below, counsel for the respondents had agreed to delete that Approval from the list; they had been led to believe that the document was not relevant to the KCP by statements contained in an affidavit filed by Alcan. The formal Trial Division decision still refers to this particular Approval (probably because the written motions had not been formally amended), but it was common ground that the issue was not before the motions judge who, in fact, does not refer to it anywhere in his reasons. In the course of the appeal hearing, however, it was realized that there had been some misunderstanding by all concerned since, in fact, the particular Approval was actually linked to the KCP and counsel for the respondents asked the Court for leave to withdraw their agreement not to attack it so as to revive the issue. Counsel for Alcan were prepared not to oppose the withdrawal, but they advised that they intended to adduce evidence to show the circumstances in which the Approval was issued with a view to arguing alternatively, if necessary, that its issuance was borne of an abundance of caution; it was not necessary for the completion of the project.

In light of these flaws, there is no doubt in my mind that this Court could not uphold the conclusions of the learned motions judge without depriving the appellants of their right to place before the Court all their means of defence.

III

The appellants go even further. They submit that, in any event, on the face of the record as it stands, however unsatisfactory and incomplete it is, even adding the issue with respect to the February 19, 1990 Approval, the only conclusion the motions judge could reach was that the EARP Guidelines did not apply to any of the impugned ministerial actions identified in the applications as having been made in relation to the Kemano Completion Project, so that the remedies sought in the originating motions could not be granted. In my judgment, this final and decisive submission is also correct.

Indeed, as I see it: (a) none of the impugned ministerial actions which are said to have triggered the application of the EARP Guidelines to the KCP constituted decisions capable of bringing the KCP within the purview of the Guidelines; and (b) if there was any doubt to that effect, Order in Council SOR/90- 729 would have definitely settled the matter.

(a) The actions were not decisions within the meaning of the Guidelines.

Section 6 of the EARP Guidelines provides that the requirements set out therein apply only to "proposals", a term which, pursuant to section 2, means "any initiative, undertaking or activity for which the Government of Canada has a decision-making responsibility". The Supreme Court of Canada, in its recent judgment in the Oldman River case, was called upon to determine, for the first time, the scope of application of the Guidelines by commenting on that definition of the term "proposal" given by section 2. In writing the reasons for a unanimous Court (Mr. Justice Stevenson dissented on other issues), Mr. Justice La Forest, after having rejected a suggestion that the Guidelines could be applicable only to projects where the federal government would be the prominent or sole decision-making authority, wrote as follows, at pp. 40, 41, 42 and 43:

> That is not to say that the Guidelines Order is engaged every time a project may have an environmental effect on an area of federal jurisdiction. There must first be a "proposal" which requires an "initiative, undertaking or activity for which the Government of Canada has a *decision making responsibility*". In my view the proper construction to be placed on the term "responsibility" is that the federal government, having entered the field in a subject matter assigned to it under s. 91 of the *Constitution Act*, 1867, must have an affirmative regulatory duty pursuant to an Act of Parliament which relates to the proposed initiative, undertaking or activity. It cannot have been intended that the Guidelines Order would be invoked every time there is some potential environmental effect on a matter of federal jurisdiction. Therefore, "responsibility" within the definition of "proposal" should not be read as connoting matters falling generally within federal jurisdiction. Rather, it is meant to signify a legal duty or obligation. Once such duty exists, it is a matter of identifying the "initiating department" assigned responsibility for its performance, for it then becomes the decision-making authority for the proposal and thus responsible for initiating the process under the Guidelines Order.

That there must be an affirmative regulatory duty for a "decision making responsibility" to exist is evident from other provisions found in the Guidelines Order which suggest that the initiating department must have some degree of regulatory power over the project. For example s. 12 provides:

> 12. Every initiating department shall screen or assess each proposal for which it is the decision making authority to determine if ... (f) the potentially adverse environmental effects that may be caused by the proposal are unacceptable, in which case the proposal shall either be modified and subsequently rescreened or reassessed or be abandoned.

Again, s. 14 reads:

> 14. Where, in any case, the initiating department determines that mitigation or compensation measures could prevent any of the potentially adverse environmental effects of a proposal from becoming significant, the initiating department shall ensure that such measures are implemented.

Those provisions amplify the regulatory authority with which the Government of Canada must have clothed itself under an Act of Parliament before it will have the requisite decision-making responsibility.

Applying that interpretation to the present case, it will be seen that the Oldman River Dam project qualifies as a proposal for which the Minister of Transport alone is the initiating department. In my view the *Navigable Waters Protection Act* does place an affirmative regulatory duty on the Minister of Transport. Under that *Act* there is a legislatively entrenched regulatory scheme in place in which the approval of the Minister is required before any work that substantially interferes with navigation may be placed in, upon, over or under, through or across any navigable water. Section 5 gives the Minister the power to impose such terms and conditions as he deems fit on any approval granted, and if those terms are not complied with the Minister may order the owner to remove or alter the work. For these reasons I would hold that this is a "proposal" for which the Minister of Transport is an "initiating department".

There is, however, no equivalent regulatory scheme under the *Fisheries Act* which is applicable to this project. Section 35 prohibits the carrying on of any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat, and s. 40 lends its weight to that prohibition by penal sanction. The Minister of Fisheries and Oceans is given a discretion under s. 37(1) to request information from any person who carries on or proposes to carry on any work or undertaking that will or may result in the alteration, disruption or destruction of fish habitat. However, the purpose of making such a request is not to further a regulatory procedure, but is merely to assist the Minister in exercising an ad hoc delegated legislative power granted under s. 37(2) to allow an exemption from the general prohibition. That provisions reads: 37. ...

> (2) If, after reviewing any material or information provided under subsection (1) and affording the persons who provided it a reasonable opportunity to make representations, the Minister or a person designated by the Minister is of the opinion that an offence under subsection 40(1) or (2) is being or is likely to be committed, *the Minister or a person designated by the Minister may, by order, subject to regulations made pursuant to paragraph (3)(b), or, if there are no such regulations in force, with the approval of the Governor in Council,*
>
> > (a) require such modifications or additions to the work or undertaking or such modifications to any plans, specifications, procedures or schedules relating thereto as the Minister or a person designated by the Minister considers necessary in the circumstances, or (b) restrict the operation of the work or undertaking,
>
> and, with the approval of the Governor in Council in any case, direct the closing of the work or undertaking for such period as the Minister or a person designated by the Minister considers necessary in the circumstances.
>
> In my view a discretionary power to request or not to request information to assist a Minister in the exercise of a legislative function does not constitute a decision-making responsibility within the meaning of the Guidelines Order. Whereas the Minister of Transport is responsible under the terms of the *Navigable Waters Protection Act* in his capacity as regulator, the Minister of Fisheries and Oceans under s. 37 of the *Fisheries Act* has been given a limited ad hoc legislative power which does not constitute an affirmative regulatory duty. For that reason, I do not think the application for mandamus to compel the Minister to act is well founded. [Emphasis added by La Forest J.]

The key words in these passages are "affirmative regulatory duty" which appears to be used in contrast to the expression "ad hoc delegated legislative power". Their exact meaning in the context in which they are used is not perfectly clear and counsel obviously were in complete disagreement as to their scope and content when came the time to apply them to the facts and legislation of the present case. Counsel for the appellants would have assigned to them quite a limited reach, arguing, for instance, that in the case of an "ad hoc delegated legislative power", such as the one conferred on the Minister of Fisheries and Oceans by subsection 37(2) of the *Fisheries Act*, the EARP Guidelines would never be triggered. Counsel for the respondents, on the contrary, favoured an extended interpretation, seeking support in the strong words used by La Forest J. at the outset of his reasons in stressing the importance that the protection of the environment had acquired in today's society.

My understanding of the judgment differs somewhat from that of counsel. I do not think that La Forest J. ever had in mind, in discussing the discretion of the Minister of Fisheries and Oceans to request information under section 37, the actual exercise of the powers he has under subsection 37(2) to impose modifications, additions or restrictions to a proposed work or undertaking. Nor do I think that the importance assigned today to the protection of the environment could have any bearing on whether an EARP review is triggered or not. The protection of the environment, in our country, is the responsibility of all levels of government, and the challenge it has become, to use the words of La Forest J., must be presumed to have been assumed by all levels of government with regard to their respective legislative authority; so it is not, in itself, the issue here. The significance of environmental protection cannot help us determine which government is entitled to, and has the duty to, assume responsibility.

The propositions for which the judgment stands, as I read it, are the following. The EARP Guidelines must be given full application in all cases where Parliament has conferred on a federal Minister the power and duty to give or refuse permission to carry on a work or to impose terms and conditions under which the work could be carried on, the promoter being precluded from acting without prior ministerial consent. The Guidelines have no application, however, when a Minister, who has been conferred the power and duty to intervene in certain conditions, is still in the stage of supervising, controlling and verifying whether those conditions requiring his intervention actually exist. The environmental impact assessment mandated by the Guidelines Order is not meant to satisfy mere academic curiosity but to help a Minister in the exercise of a duty to intervene and act positively with respect to the execution or completion of a project.

It is on the basis of these propositions that I have concluded that none of the impugned actions of the Ministers namely: i) the execution of the Settlement Agreement; ii) the decision pursuant to subsection 20(10) of the *Fisheries Act*; iii) the several declarations of exemption pursuant to subsection 5(2) of the *Navigable Waters Protection Act*; and finally iv) the Approval pursuant to subsection 10(2) of the *Navigable Waters Protection Act*, required the previous application of the Guidelines to the Project, because none was the result of a decision made in the exercise of a federal Minister's decision-making responsibility.

> (i) The execution of the Settlement Agreement by the Minister of Fisheries and Oceans was not such an action. First, as we have seen, this was an agreement between Alcan, Her Majesty the Queen in right of Canada and Her Majesty the Queen in right of the Province of British Columbia which was aimed at, inter alia, settling litigation between Alcan and the Federal Crown. The decision to settle was an executive decision taken by the Government of Canada. The Minister of Fisheries and Oceans simply signed the Agreement on behalf of the Crown. He prepared the decision, of course, and his influence in Cabinet would surely be an important factor given his potential future responsibility, but he did not exercise any independent decision-making authority with respect to it; an Order in Council, P.C. 1987-2481, approving the Settlement Agreement had to be passed.

Besides, the lawsuit which was being settled by the Agreement had been initiated, as indicated above, as a result of concerns raised by the federal fisheries officials about the level of water released into the Nechako River from the existing facilities and the main issue was the scope of the Minister's statutory and constitutional power to control flows on the Nechako River under the *Fisheries Act*. It was of course inevitable that, in determining the conditions of the settlement, not only the existing facilities but also their projected extension would be taken into account. But, that did not make the decision to enter into the Agreement one taken pursuant to any affirmative regulatory duty established under an Act of Parliament.

It is argued that, by virtue of the provisions of the Settlement Agreement, the Minister of Fisheries and Oceans has assumed some type of regulatory duty in relation to the KCP. That may be the case, but the duty would be new and assumed; it would not be a duty conferred under a federal statute, and the Agreement was obviously not entered into pursuant to any such duty. On the other hand, if the creation of a mechanism for the cooperative management of the fish and water resources of the Nechako River is, no doubt, one of the main aspects of the Agreement, such a mechanism simply provides a means of assisting the Minister in carrying out his general responsibilities in relation to fish. The mechanism does not by itself create an affirmative regulatory duty in the Minister. On the contrary, it is meant to render unnecessary the exercise of his power to intervene and enforce special terms and conditions that may become warranted.

> (ii) Similarly, the signing by the same Minister of Fisheries and Oceans of a letter-opinion pursuant to subsection 20(10) (now subsection 22(3)) of the *Fisheries Act*, was not a decision which could trigger the application of the Guidelines.

Subsection 22(3) provides as follows:

> S-s. 22(3) The owner or occupier of any obstruction shall permit the escape into the river-bed below the obstruction of such quantity of water, at all times, as will, in the opinion of the Minister, be sufficient for the safety of fish and for the flooding of the spawning grounds to such depth as will, in the opinion of the Minister, be necessary for the safety of the ova deposited thereon.

This provision does not concern the approval or rejection of a proposal or project. Rather, it contemplates an obstruction already in place. Besides, in expressing his view as to the flows required to provide sufficient water for the safety of fish and the flooding of the spawning grounds, the Minister was not exercising an affirmative regulatory duty, but rather, stating the conditions under which he would not consider it to be his duty to intervene. In other words, the opinion-letter was not an approval but merely a direction as to how the project should proceed to satisfy the obligations imposed on the owner or occupier by the law.

> (iii) It is also clear to me that the declarations of exemption issued by the Minister of Transport for certain elements of the KCP that required construction in, or across, navigable waters could not trigger the application of the Guidelines.

The section of the *Navigable Waters Protection Act*, R.S.C. 1985, c. N-22, which was applicable is the following:

> Sec. 5(1) No work shall be built or placed in, on, over, under, through or across any navigable water unless
>
> > (a) the work and the site and plans thereof have been approved by the Minister, on such terms and conditions as the Minister deems fit, prior to commencement of construction;
> >
> > b) the construction of the work is commenced within six months and completed within three years after the approval referred to in paragraph (a) or within such further period as the Minister may fix; and

> > (c) the work is built, placed and maintained in accordance with the plans, the regulations and the terms and conditions set out in the approval referred to in paragraph (a).
>
> (2) Except in the case of a bridge, boom, dam or causeway, this section does not apply to any work that, in the opinion of the Minister, does not interfere substantially with navigation.

In providing in subsection 5(2) that, where a project does not interfere substantially with navigation, subsection 5(1) does not apply, Parliament has clearly indicated that the Minister has no regulatory duty or power in relation to works which do not interfere with navigation. This limitation is wholly in keeping with the federal jurisdiction under the Constitution, which only arises when there is an actual or eventual impact on navigation.

The declarations of exemption in question here were all strictly based on an acknowledgement that the works described would not interfere substantially with navigation. As a result, the approval provisions of subsection 5(1) were not applicable. We are strictly concerned here with a finding of fact. The word exemption may be misleading, although there is, in a sense, an exemption from the necessity of approval. In reality, a subsection 5(2) "exemption" is an acknowledgement based on a finding of fact. It may be that the finding of fact behind the acknowledgement was not accurate and could somehow be disputed. But obviously, the mere making of a finding of fact cannot be treated, in this context or in any other, as an exercise of regulatory power.

(iv) The same reasoning applies, it seems to me, to the Approval, dated February 19, 1990, granted by the Minister of Transport pursuant again to the *Navigable Waters Protection Act*, more precisely its subsection 10(2).

Section 10 of the *Navigable Waters Protection Act* reads thus:

> Sec. 10(1) Any lawful work may be rebuilt or repaired if, in the opinion of the Minister, interference with navigation is not increased by the rebuilding or repairing.
>
> (2) Any lawful work may be altered if (a) plans of the proposed alteration are deposited with and approved by the Minister; and (b) in the opinion of the Minister, interference with navigation is not increased by the alteration.
>
> (3) For the purposes of sections 5, 6 and 12, a reference to the plans of a work shall be construed as including the plans of the alteration thereof referred to in subsection (2).
>
> (4) Where, in the opinion of the Minister, an existing lawful work has become a danger to or an interference with navigation by reason of the passage of time and changing conditions in navigation of the navigable waters concerned, any rebuilding, repair or alteration of the work shall be treated in the same manner as a new work.

In my view, an approval under subsection (2) is of the same type as a subsection 5(2) exemption. It is true that, on the face of the enactment, the Minister has to make a decision of approval; but one should not be misled by the legislative technique. The decision under subsection 10(2) amounts to an acknowledgement that the alteration will not, as a fact, interfere substantially with navigation, with the result that the Minister will not have to exercise his power to intervene.

Thus, in my judgment, none of the impugned actions of the Minister could have drawn the application of the Guidelines to the Project.

(b) SOR/90-729: The Exemption Order

In any event, even if my analysis above is faulty, the "Exemption Order" would have settled the matter. SOR/90-729 expressly provides that the EARP Guidelines do not apply to the Kemano Project. It reads as follows:

> P.C. 1990-2252 12 October, 1990
>
> His Excellency the Governor in Council, on the recommendation of the Minister of the Environment, pursuant to section 6 of the *Department of the Environment Act*, is pleased hereby to approve the annexed Order establishing the Kemano Completion Project Guidelines, made by the Minister of the Environment on October 4, 1990.
>
> ORDER ESTABLISHING THE KEMANO COMPLETION PROJECT GUIDELINES
>
> Short Title
>
> 1. This Order may be cited as the Kemano Completion Project Guidelines Order.
>
> 2. The Environmental Assessment and Review Process Guidelines Order does not apply to the project known as the Kemano Completion Project and, in particular, to any decisions made as a result of the Settlement Agreement entered into by Her Majesty in right of Canada, Her Majesty in right of the Province of British Columbia and Alcan Aluminum Limited on September 14, 1987 and approved by the Governor in Council by Order in Council P.C. 1987- 2481 of December 10, 1987.

This Order in Council was, on its face, an obvious bar to the relief sought by the respondents in their originating motions and the motions judge saw immediately that, in spite of his reservations about whether it was open to him to do so, he had to quash it, if his conclusions that the Guidelines were applicable were to be given effect. He said as follows (at p. 39):

> Paragraph 5 presents a more difficult problem in view of the Order-in-Council SOR/90-729 since there is considerable doubt by virtue of the jurisprudence whether it can be quashed in the present proceedings if at all. The Applicants insist that it is the recommendation of the Minister leading to the adoption of the Order-in-Council which they seek to quash and if it is quashed, then the Order-in-Council itself will be without effect. While I am prepared to quash the Minister's decision, it would appear that if nothing is said with respect to the Order-in- Council, it may well be subsequently relied on by Respondents in order to defeat the Order to be made herein to hold an Environmental Assessment Review under the EARP

> process. This would result in subsequent time-consuming proceedings. In practice therefore in order to avoid this, it may be necessary not only to quash the Minister's recommendation that no review be made, but also the resulting Order-in- Council adopting this recommendation, so I will also grant certiorari with respect to paragraph 5 of the Motions.

The learned judge does not indicate the legal basis on which he relies to set the Order in Council aside. Elsewhere in his reasons, he vaguely addresses criticism with respect to its adoption and notes, with some irritation, that it was passed the day following the filing of the originating motions. But in this central passage just quoted, while he gives an explanation as to why he feels it necessary to quash the Order, he does not say on what ground he was doing so. The respondents, in defending the judge's conclusion, reiterated what they had alleged in the proceedings, namely: that the Order was ultra vires the powers conferred by the *Act*; that it was enacted in bad faith and contrary to section 35 of the Constitution; and finally that it was passed in disregard of the legitimate expectations of the respondents. Could any of these grounds be sustained? I think not.

Whether the Order in Council is characterized as an amendment to the EARP Guidelines enacted for the purpose of specifically exempting the Project from their application, or as a mere confirmation that the scope of the Guidelines did not extend to it, made with a view to clarifying the situation, it seems to me that, passed, as it was, pursuant to section 6 of the *Department of the Environment Act*, it was clearly authorized by Parliament. The power to adopt regulations or other legislative enactments necessarily includes the power to clarify, amend or vary those regulations or enactments subsequently, provided, of course, that the power is not exercised in a manner which would contravene the intentions of the legislature. But, I simply do not see how it could be said that the Order in Council is not in conformity with the duties and functions of the Minister of the Environment defined in section 4 of the *Department of the Environment Act* or was enacted without due regard to the prescriptions set out in section 5 of the said *Act* [Footnote appended to judgment].

It was argued that there is a fundamental constitutional principle to the effect that a delegated legislative authority cannot dispense with the law unless power to do so has been formally conferred on it. A passage of Professor Hogg's treatise on the Constitutional Law of Canada (2nd ed. 1985), at p. 631, was relied upon with the cases referred to therein. The passage is the following:

> A corollary of cases such as *Entick* v. *Carrington and Roncarelli* v. *Duplessis* is that the Prime Minister (or Premier) or a Minister of the Crown or any other representative of the government has no power to suspend the operation of a law for a time, or to dispense with a law in favour of a particular person or group. These "suspending" and "dispensing" powers were asserted by the Stuart Kings, but were abolished by the Bill of Rights of 1688. From time to time, modern governments assert such powers, and the assertions are repudiated by the courts, who always add a stern admonition that the Crown is not above the law.(21)

And footnote 21 reads thus:

> *Fitzgerald* v. *Muldoon* [1976] 2 N.Z.L.R. 615 (N.Z.S.C.) (N.Z. Prime Minister may not suspend statutory obligation to contribute to state pension plan); *Re Anti-Inflation Act*

> [1976] 2 S.C.R. 373 (Lieutenant Governor in Council may not change law by agreement with Governor in Council); *Man. Govt. Employees Assn.* v. *Govt. of Man.* [1978] 1 S.C.R. 1123 (same decision); *R.* v. *Catagas* (1977) 81 D.L.R. (3d) 396 (Man. C.A.) (Minister may not dispense with *Migratory Birds Convention Act* in favour of native people.

A misunderstanding must be avoided here. It is obvious that the will of Parliament is paramount and no administrative or executive authority is entitled to contravene it, whether directly or indirectly. But that does not mean that a delegate empowered to make subordinate law has no power to dispense from the law he makes. This could be so, I agree, if it appears that Parliament's intention was that the law to be made would be applicable to everyone. For example, had the word "must" been used in section 6 of the *Department of the Environment Act* instead of "may", an argument could have been made that the intention was to forbid any exemption. But this is not the case. And if the original Guidelines could have had a clause exempting the KCP, why could the same result not be achieved in two steps? Frequent use of this device could undermine the credibility of the Guidelines, but surely this is a matter for Parliament to resolve, not the Courts. It is obvious to me that SOR/90-729 cannot be said to have been passed in contravention of the intentions of Parliament.

On the other hand, the allegation that the Order in Council would have been passed in bad faith and contrary to section 35 of the Charter, if relevant, which I doubt, remains totally unsubstantiated. If the purpose of the *Act* has not been breached, there can be no question of bad faith, and, on the evidence before the Court, section 35 of the Charter can have no bearing whatsoever. To say that in passing the Order in Council, the Government was illegally breaching its fiduciary duty towards aboriginals, not only would one have to be aware of the precise content of that duty but, more particularly, be satisfied that the only way to fulfill that duty, in the circumstances, would be to confirm the application of the Guidelines to the Project. Of course, there is nothing in the record that could lead to such a conclusion.

Finally, I do not see how the Order could be impugned on the ground of legitimate expectation. First, the circumstances required to give support to a possible application of this recently developed doctrine of legitimate expectation do not exist as the evidence does not show that there has ever been a promise from someone in authority on which reliance was placed by the respondents. Second, and more importantly, the doctrine, as I understand it, was meant to apply in matters of administrative procedure; it does not and cannot, it seems to me, have any bearing on the validity of legislative enactment.

There is simply no basis, in my judgment, on which Order in Council SOR/90-729 could be declared of no force and effect. If I am wrong in thinking that none of the impugned ministerial actions by themselves were subject to the application of the EARP Guidelines to the KCP, this so-called Exemption Order would settle all difficulties.

My overall conclusion, therefore, is that the appeals should be allowed and the cross-appeal dismissed; the various orders issued by the motions judge should be quashed and the originating motions of the respondents should be dismissed.

The appellants should be entitled to their costs both here and in the Trial Division. While the originating motions were argued together both here and below, the appellant Alcan and the appellant Ministers were represented by separate counsel in both Divisions. Accordingly, the appellant Alcan and the appellant Ministers should be entitled to a separate set of costs in this Court as well as in the Trial Division.

MARCEAU J. HEALD J.:-- I agree. LINDEN J.:-- I agree.

* * * * *

Footnote

I reproduce here sections 4, 5 and 6 of the *Department of the Environment Act*:

> Sec. 4(1) The powers, duties and functions of the Minister extend to and include all matters over which Parliament has jurisdiction, not by law assigned to any other department, board or agency of the Government of Canada, relating to
>
> > (a) the preservation and enhancement of the quality of the natural environment, including water, air and soil quality; (b) renewable resources, including migratory birds and other non-domestic flora and fauna; (c) water; (d) meteorology; (e) notwithstanding paragraph 4(2)(f) of the *Department of National Health and Welfare Act*, the enforcement of any rules or regulations made by the International Joint Commission, promulgated pursuant to the treaty between the United States of America and His Majesty, King Edward VII, relating to boundary waters and questions arising between the United States and Canada, in so far as they relate to the preservation and enhancement of the quality of the natural environment; (f) the coordination of the policies and programs of the Government of Canada respecting the preservation and enhancement of the quality of the natural environment; (g) national parks; and (h) national battlefields, historic sites and monuments.
>
> (2) The powers, duties and functions of the Minister also extend to and include such other matters, relating to the environment and over which Parliament has jurisdiction, as are by law assigned to the Minister.
>
> 5. The Minister, in exercising his powers and carrying out his duties and functions under section 4, shall
>
> > (a) initiate, recommend and undertake programs, and coordinate programs of the Government of Canada that are designed (i) to promote the establishment or adoption of objectives or standards relating to environmental quality, or to control pollution, (ii) to ensure that new federal projects, programs and activities are assessed early in the planning process for potential adverse effects on the quality of the natural environment and that a further review is carried out of those projects, programs and activities that are found to have probable significant adverse effects, and the results thereof taken into account, and (iii) to provide to Canadians

> environmental information in the public interest; (b) promote and encourage the institution of practices and conduct leading to the better preservation and enhancement of environmental quality, and cooperate with provincial governments or agencies thereof, or any bodies, organizations or persons, in any programs having similar objects; and (c) advise the heads of departments, boards and agencies of the Government of Canada on all matters pertaining to the preservation and enhancement of the quality of the natural environment.

6. For the purposes of carrying out his duties and functions related to environmental quality, the Minister may, by order, with the approval of the Governor in Council, establish guidelines for use by departments, boards and agencies of the Government of Canada and, where appropriate, by corporations named in Schedule III to the *Financial Administration Act* and regulatory bodies in the exercise of their powers and the carrying out of their duties and functions.

List of other Respondents

Marvin Charlie, Chief of the Cheslatta Indian Band, on behalf of himself and all other members of the Cheslatta Indian Band, Maureen Ogen, Chief of the Broman Lake Indian Band, on behalf of herself and all other members of the Broman Lake Indian Band, Geoffrey Thomas, Chief of the Stoney Creek Indian Band, on behalf of himself and all other members of the Stoney Creek Indian Band, Peter Quaw, Chief of the Fort George Indian Band, on behalf of himself and all other members of the Fort George Indian Band, Ernie Nooski, Chief of the Fraser Lake Indian Band, on behalf of himself and all other members of the Fraser Lake Indian Band, Robert Michell, Chief of the Stellaquo Indian Band, on behalf of herself and all other members of the Stellaquo Indian Band, Leonard Thomas, Chief of the Necoslie Indian Band, on behalf of himself and all other members of the Necoslie Indian Band, Edward John, Chief of the Tl'azt'en Nation Indian Band, on behalf of himself and all other members of the Tl'azt'en Nation, Roy French, Chief of the Takla Lake Indian Band, on behalf of himself and all other members of the Takla Lake Indian Band, Wilf Adam, Chief of the Lake Babine Indian Band, on behalf of himself and all other members of the Lake Babine Indian Band and Robert Charlie, Chief of the Burns Lake Indian Band, on behalf of himself and all other members of the Burns Lake Indian Band, Respondents

ONTARIO COURT (GENERAL DIVISION)

[Indexed as: *Ontario (Attorney General)* v. *Tyre King Tyre Recycling Ltd.*]

Attorney General for Ontario v. Tyre King Tyre Recycling Ltd., Straza, Cayuga Materials & Construction Co. Ltd., Sun Life Trust Co., White, Doolittle, Hill, Hill and Laforme

Montgomery J.

May 15, 1992

***Fisheries Act*, R.S.C. 1985, c. F-14, s. 42(1) – civil action against defendants for costs of clean up for Hagersville tire fire – motion for summary judgement by defendant Sun Life Trust – issue whether mortagee not in possession had sufficient control to establish liability – there is no responsibility where mortagee has taken no steps to gain possession – defendant was not liable for costs under s. 42(1) of the *Fisheries Act* – no genuine issue to be tried**

Summary: This is a motion by the defendant, Sun Life Trust Company, for an order dismissing the action against it on the basis that there is no genuine issue for trial.

This action arose out of the large tire fire which started on February 12, 1990 near Hagersville, Ontario. The defendant, Sun Life, was the successor to Counsel Trust Company which had loaned funds to the defendant, Straza, which funds were secured by a first mortgage on property owned by Straza adjoining the site of the fire. The mortgage was in good standing until after the fire and Sun Life never took possession of the mortgaged property. The plaintiff initially brought a civil action against the defendants for $100,000,000 which was subsequently reduced to $187,000, the amount of the mortgage.

The plaintiff's action was based on several causes of action being: negligence, nuisance and unjust enrichment. Three categories of negligence were pleaded: (1) non-statutory, (2) failure to comply with 2 orders under the *Environmental Protection Act*, and (3) failure to comply with statutory obligations under the *Emergency Plans Act, 1993* and the *Fisheries Act*. In each category, the court found that for a finding of liability, it was necessary that the plaintiff had exercised some measure of control. The learned justice, following *Canadian National Railway Co.* v. *Ontario (Director under the Environmental Protection Act)*, found that a security holder not in possession did not become a person with "charge, management and control" even if there were knowledge of the site. Specifically, with respect to s. 42(1) of the *Fisheries Act*, the court found there was no basis to conclude that the mortgagee not in possession could be said to "own", have the "charge, management or control" or "cause or contribute to the causation of a deposit of any deleterious substance".

The court held, with respect to the claim in nuisance, that Sun Life Trust was not an "occupier", and thereby not liable for any nuisances from the Straza property. The claim of unjust enrichment was also rejected by the court, on the basis that Sun Life had no responsibility for clean up costs, and consequently did not benefit from the cost of that work borne by the Province of Ontario.

Held: Application granted.

REASONS/MOTIF:

Linda C. McCaffrey, Q.C., Counsel for the Plaintiff
H. Lrne Morphy, Q.C. and Michael A. Penny, Counsel for the Defendant, Sun Life Trust Co.

MONTGOMERY J.:--This is a motion for summary judgment by the defendant, Sun Life Trust Company (Sun Life Trust), to have the action against it dismissed on the basis that there is no genuine issue for trial. In brief, the central issue is whether a mortgagee, not in possession of, or otherwise directing, controlling or managing the mortgaged property, owes any common law duty of care or any statutory responsibility to the plaintiff for a fire occurring on the property and resulting environmental damage.

The facts

The action is a claim by the Attorney General for damages resulting from a large tire fire, which commenced on February 12, 1990, near Hagersville, Ontario. There were two adjoining properties, one of which was a 3.5-acre parcel on which was situate the residence of the defendant Straza (the "Straza residential property"); the other parcel was a 10-acre parcel leased to and subsequently purchased by Straza.

Sun Life Trust is the successor to Counsel Trust Company (Counsel Trust). Counsel Trust and Sun Life Trust were amalgamated by order of the Superintendent of Financial Institutions effective January 1, 1991.

In July of 1987 Counsel Trust advanced a loan of $140,000 to the defendant Straza personally. This loan was secured by a first mortgage on the 3.5-acre Straza residential property. In July of 1988, Counsel Trust increased the amount of the loan to $187,875 and Counsel Trust took a new first mortgage on the Straza residential property as security (the Straza mortgage). The term of the Straza mortgage was initially for one year but was extended for a further three years in July of 1989.

The Straza mortgage incorporated terms and conditions which were set out in standard charge terms for all Counsel Trust mortgages. The Straza mortgage was maintained in good standing until after the tire fire when it went into default on March 1, 1990.

As the mortgage was not in default, Sun Life Trust never took possession of the Straza residential property. It, at no time, exercised any power, management or control over the defendant Straza, the Straza residential property, or any business entities owned or controlled by the defendant Straza.

The only allegation of fact in the statement of claim pleaded to support the various causes of action against Sun Life Trust is that Counsel Trust held a mortgage on the Straza residential property which, by its terms, gave Counsel Trust, at its option: (a) the contractual right to enter and to make repairs; and (b) the contractual right to demand payment of the mortgage in full if the property was not kept in repair.

The statement of claim also makes reference to two *Environmental Protection Act* orders having been issued concerning the property owned by the defendant Straza. Neither of these orders were directed to Counsel Trust nor was it aware of their existence prior to the commencement of the fire.

The statement of claim alleges against Sun Life Trust, and the other defendants, the following causes of action:

(i) negligence;

(ii) a claim under the *Environmental Protection Act*, R.S.O. 1980, c. 141;

(iii) a claim under the *Emergency Plans Act*, 1983, S.O. 1983, c. 30;

(iv) a claim under the *Fisheries Act*, R.S.C. 1985, c. F-14;

(v) nuisance; and

(vi) unjust enrichment.

The claim asserted against the defendants is for $100 million. This claim upon probing counsel for the Crown was reduced to $187,000, the amount of the mortgage. In my view, plaintiffs must be careful not to exaggerate the extent of their claims. Defendants stand at risk and must carry a contingent liability on their financial statements for outstanding claims. Whatever the ultimate disposition of this action on appeal, the claim against the defendant Sun Life Trust is restricted to $187,000, on the consent of both counsel. In every case, such a broad divergence between the original claim and the ultimate claim is something for the court to consider in assessing costs.

Mr. Murphy grounds his attack to dismiss the action against his client under rule 20.04(2) of the *Rules of Civil Procedure*, O. Reg. 560/84, on three bases.

(1) There is no genuine issue for trial as the first five claims asserted (all but unjust enrichment) require that Sun Life Trust had control or management over the property.

(2) Sun Life Trust is a mere mortgagee not in possession and lacked that requisite control over management of the property.

(3) A contractual option, such as in the mortgage, is there for the sole benefit of the mortgagee; a third party cannot base a claim on a mortgagee's failure to exercise a contractual right.

I now propose to address the claims asserted in detail.

Negligence

There is no plea in the statement of claim of any duty Sun Life Trust owes to the plaintiff. Three categories of negligence are pleaded: the first is non-statutory; the second is failure to comply with two orders under the *Environmental Protection Act*; and the third category is failure to comply with statutory obligations.

All of these categories require Sun Life Trust to be in control. It was not a party to and had no knowledge of the orders under the *Environmental Protection Act*.

The law of negligence rests upon the tortfeasor having a measure of control. The respondent relies upon the principle in *M'Alister (or Donoghue)* v. *Stevenson*, [1932] A.C. 562, 101 L.J.P.C. 119 (H.L.), to cast Sun Life Trust in the role of "neighbour" thus owing a duty. That casts the net too far. Because there is no element of control, in my view, *Donoghue* v. *Stevenson* has no application.

In *Modern Realty Co.* v. *Shantz*, [1928] S.C.R. 213, [1928] 2 D.L.R. 705, at p. 221 S.C.R., p. 712 D.L.R., Newcombe J. said:

> A mortgagee is not by law compelled to take possession; he must assume the management of the estate . . .
>
> The law on the subject is clear. The possession of the mortgagor is a lawful possession, and he is entitled to remain in possession until ordered to deliver up possession or until possession is demanded by or on behalf of the mortgagee; and it is also clear that a mortgagee cannot obtain an account of back rents due from the mortgagor in respect of his possession.

In *R.* v. *Wong* (1977), 2 Alta. L.R. (2d) 90, 33 C.C.C. (2d) 6 (C.A.), Prowse J.A. said at p. 94 Alta. L.R., p. 9 C.C.C.:

> The Crown's position on the appeal is that Wong Investments Ltd. or alternatively the accused, was an owner "having charge or control" of the premises. It argued that after the owner became aware of the use being made of the premises by Odgers it was in a position to terminate the lease by notice, or alternatively to immediately take steps to recover possession of the premises and that the power to do so was tantamount to having charge or control. In my view this argument confuses the power to acquire "charge or control" with "having charge or control". Once the owner leased the premises to Odgers, Odgers had charge and control of the premises and the owner could only acquire charge and control by evicting Odgers from the premises.

Fisher & Lightwood's *Law of Mortgage*, 10th ed., p. 371, sets out:

> Mortgagee's liability for negligence. The mortgagee will be liable to the mortgagor for gross or wilful negligence resulting in damage to the mortgaged property arising out of his possession of the mortgaged property. This will be so, for example, if mortgaged mines are

> flooded by improper working, or mortgaged chattels are injured by negligent removal. The mortgagee will be liable for loss due to alterations injurious to the value of the property, such as the pulling down of cottages on an estate or the cutting of timber. In such a case he will be charged with the value thereof with interest, or be liable to pay such rent as would otherwise have been received, and the same applies if, being in possession under a mortgage of unfinished leasehold buildings, he neither sells the property nor completes the building, and so the leases are forfeited. He will also be liable if, after an order for possession has been made in his favour, he fails to take reasonable steps to protect the premises, eg, against vandals, and damage to the premises ensues. As to liability to persons other than the mortgagor, the mortgagee in possession will be subject to liability for loss or injury through nuisance, dis-repair, etc, as any other person who has control of property.

Falconbridge on Mortgages, 4th ed. (1977), pp. 643-44, states:

> A mortgagee takes possession when he deprives the mortgagor of the control and management of the mortgaged property.

In *Noyes* v. *Pollock* (1886), 32 Ch.D. 53 (C.A.) at p. 61, Cotton L.J. said:

> In order to hold that a mortgagee not in actual possession is in receipt of the rents and profits, in my opinion it ought to be shewn not only that he gets the amount of the rents paid by the tenants, even although he gets their cheques or their cash, but that he receives it in such a way that it can be properly said that he has taken upon himself to intercept the power of the mortgagor to manage his estate, and has himself so managed and received the rents as part of the management of the estate.

In *Smith* v. *Littlewoods Organisation Ltd.*, [1987] 1 A.C. 241, [1987] 1 All E.R. 710 (H.L. (Sc.)), Lord Goff of Chieveley said, at p. 279 A.C., p. 735 All E.R.:

> Of course, if persons trespass upon the defender's property and the defender either knows or has the means of knowing that they are doing so and that in doing so they constitute a danger to neighbouring property, then the defender may be under an affirmative duty to take reasonable steps to exclude them, in the limited sense explained by Lord Wilberforce in *Goldman* v. *Hargrave* [1967] 1 A.C. 645, 663-664; but that is another matter. I incline to the opinion that this duty arises from the fact that the defender, as occupier, is in exclusive control of the premises upon which the danger has arisen.

In *Canadian National Railway Co.* v. *Ontario (Director under the Environmental Protection Act)* (1991), 3 O.R. (3d) 609, 80 D.L.R. (4th) 269 (Div. Ct.) [affirmed, infra], the court said at pp. 622-24 O.R., pp. 282-83 D.L.R.:

> III. Is a mortgagee who is not an owner or person in control responsible?
>
> Where there has been an infraction of the Act, to be guilty of an offence the doctrine of strict liability applies without the necessity of finding fault. The onus then shifts to the offender to show that he has taken all reasonable steps to avoid the contamination. The

> Board made a finding of fact that NWP had breached the covenant in the mortgage to keep the plant in a good state of repair. The Director therefore submits that Abitibi did not take the necessary, reasonable steps to remedy the situation because it did not exercise its rights to declare the mortgage in default and enter and take control of the plant and stop further contamination. For the purpose of this case, we see no difference between a mortgage of the lease and a mortgage of land in the more normal situation.
>
> As there was evidence of further contamination after the granting of the mortgage, the Board could express its opinion as to a default. However, such a finding or opinion is not legally binding. Whether or not there was a default of the covenant sufficient to warrant a re-entry is a question of fact and law to be determined by a court. We do not find it necessary or proper to determine any such default in this case. The Board had no power to move from its own finding of default to its stated position that the mortgagee had the power to re-enter. . . . . .
>
> To be an owner within the meaning of the Act, and subject to the serious responsibility imposed by it, there must be possession or dominion over the facility or property. See *Wynne* v. *Dalby* (1913), 30 O.L.R. 67, 16 D.L.R. 710 (C.A.), at p. 74 O.L.R., pp. 715-16 D.L.R. There was no such possession or dominion by Abitibi in this case. We do not believe it makes any difference whether a mortgagee such as Abitibi had knowledge of the contamination or not. If a mortgagee has taken no active steps with respect to gaining or obtaining control of the property, it is not responsible.

In *Canadian National Railway Co.* v. *Ontario (Director under the Environmental Protection Act)* (1992), 7 O.R. (3d) 97, 87 D.L.R. (4th) 603 (C.A.), the court said at pp. 100-01 O.R., p. 607 D.L.R.:

> We agree with the Divisional Court that ss. 6 and 17, in their form at the material time, were restricted to present, not former, owners and operators, and that the Director's order could not be addressed to Abitibi by reason of the activities conducted by it during the period of its ownership or operation prior to 1982. Although not determinative of the issue, we note that, by amendments made in 1990, the reach of ss. 6 and 17 (now numbered ss. 7 and 18) was extended to previous owners and occupiers and to persons who "had" charge, management or control of a source of contaminant, undertaking or property.
>
> We are also of the view that Abitibi's position as a holder of security not in possession did not bring it within s. 6, as a person having "charge, management or control of a source of contaminant" within the definition of "person responsible" in s. 1(1)(m), or within s. 17, as a person having "management or control of an undertaking or property", and that it was not brought within those statutory provisions by reason of its knowledge of and prior connection with the operations conducted at the site.

Sun Life Trust loaned money to Straza personally, not to Tyre King, and it took security by way of a mortgage. It brought nothing to the property.

The respondent relied heavily on the case of *R.* v. *Sault Ste. Marie* (City) , [1978] 2 S.C.R. 1299, 85 D.L.R. (3d) 161. The city entered into a contract with an independent contractor to dispose of its garbage. The disposition resulted in environmental damage.

Dickson J. (as he then was) said at p. 1330 S.C.R., pp. 184-85 D.L.R.:

> Nor does liability rest solely on the terms of any agreement by which a defendant arranges for eventual disposal. The test is a factual one, based on an assessment of the defendant's position with respect to the activity which it undertakes and which causes pollution. If it can and should control the activity at the point where pollution occurs, then it is responsible for the pollution. Whether it "discharges", "causes", or "permits" the pollution will be a question of degree, depending on whether it is actively involved at the point where pollution occurs, or whether it merely passively fails to prevent the pollution. In some cases the contract may expressly provide the defendant with the power and authority to control the activity. In such a case the factual assessment will be straightforward. Prima facie, liability will be incurred where the defendant could have prevented the impairment by intervening pursuant to its right to do so under the contract, but failed to do so. Where there is no such express provision in the contract, other factors will come into greater prominence. In every instance the question will depend on an assessment of all the circumstances of the case. Whether an "independent contractor" rather than an "employee" is hired will not be decisive.

It is argued that the mortgagee had reserved to itself certain rights of entry into the property and thus had a measure of control.

In the *CNR* case, supra, the Divisional Court distinguishes the *Sault Ste. Marie* case.

In my view the facts there fall within the scope of the CNR case and I conclude, as well, that the *Sault Ste. Marie* case does not apply.

There can be no knowledge imputed to the applicant about the tire storage. There was no cross-examination on any affidavit material. It thus stands uncontradicted.

I conclude that there is no genuine issue to be tried based upon negligence.

Claims under s. 87 of the *Environmental Protection Act*

Section 87(2) of the Act provides for the payment of compensation in certain circumstances with respect to environmental damage. The section provides:

> 87(2) Her Majesty in right of Ontario or in right of Canada or any other person has the right to compensation,
>
> > (a) for loss or damage incurred as a direct result of,
> >
> > > (i) the spill of a pollutant that causes or is likely to cause an adverse effect,

> > (ii) the exercise of any authority under subsection 88(1) or the carrying out of or attempting to carry out a duty imposed or an order or direction made under this Part, or
> >
> > (iii) neglect or default in carrying out a duty imposed or an order or direction made under this Part;
>
> (b) for all reasonable cost and expense incurred in respect of carrying out or attempting to carry out an order or direction under this Part,

from the owner of the pollutant and the person having control of the pollutant.

Section 79(1)(e) defines "person having control of a pollutant" to mean:

> (e) . . . the person and his employee or agent, if any, having the charge, management or control of a pollutant immediately before the first discharge of the pollutant, whether into the natural environment or not, in a quantity or with a quality abnormal at the location where the discharge occurs, and "person having control of the pollutant" has a corresponding meaning;

I conclude that Sun Life Trust was neither an owner nor a person having control of a pollutant.

There is, therefore, no genuine issue to be tried under the *Environmental Protection Act* .

Claim under the *Emergency Plans Act*, 1983

Section 12 of the *Emergency Plans Act*, 1983 provides:

> 12. Where money is expended or cost is incurred by a municipality or the Crown in the implementation of an emergency plan or in connection with an emergency, the municipality or the Crown, as the case may be, has a right of action against any person who caused the emergency for the recovery of such money or cost, and for the purposes of this section, "municipality" includes a local board of a municipality, a county and a local services board.

(Emphasis added)

Sun Life Trust did not cause an emergency to be declared and accordingly can have no liability to the Attorney General under this statute.

Claim under the *Fisheries Act*

Section 42(1) of the *Fisheries Act* imposes liability to compensate for certain environmental damage as follows:

> 42(1) Where there occurs a deposit of a deleterious substance in water frequented by fish that is not authorized under section 36 or a serious and imminent danger thereof by reason of any condition, the persons who at any material time
>
> > (a) own the deleterious substance or have the charge, management or control thereof, or
> >
> > (b) are persons other than those described in paragraph (a) who cause or contribute to the causation of the deposit or danger thereof,
>
> are, subject to subsection (4) in the case of the persons referred to in paragraph (a) and to the extent determined according to their respective degrees of fault or negligence in the case of the persons referred to in paragraph (b), jointly and severally liable for all costs and expenses incurred by Her Majesty in right of Canada or a province, to the extent that those costs and expenses can be established to have been reasonably incurred in the circumstances, of and incidental to the taking of any measures to prevent any such deposit or condition or to counteract, mitigate or remedy any adverse effects that result or may reasonably be expected to result therefrom.

There is no basis on which a mortgagee not in possession could be said to "own", have the "charge, management or control" or "cause or contribute to the causation of a deposit of any deleterious substance".

Claim in nuisance

In law, the person liable in nuisance is the occupier of the property from which the nuisance emanates. Sun Life Trust, not being in any way in possession or control of the Straza residential property is not, in law, liable for any nuisance emanating from Straza's activities on Straza's properties.

See *Smith* v. *Scott*, [1973] Ch. 314, [1972] 3 All E.R. 645, at p. 321 Ch., pp. 648-49 All E.R.:

> (1) It is established beyond question that the person to be sued in nuisance is the occupier of the property from which the nuisance emanates. In general, a landlord is not liable for nuisance committed by his tenant, but to this rule there is, so far as now in point, one recognised exception, namely, that the landlord is liable if he has authorised his tenant to commit the nuisance: *Harris* v. *James* (1876) 35 L.T. 240. But this exception has, in the reported cases, been rigidly confined to circumstances in which the nuisance has either been expressly authorised or is certain to result from the purposes for which the property is let: *Rich* v. *Basterfield* (1847), 4 C.B. 783 and *Ayers* v. *Hanson, Stanley & Prince* (1912) 56 S.J. 735; and see generally *Clerk and Lindsell on Torts*, 13th ed. (1969), p. 805, para. 1426; *Salmond on the Law of Torts*, 15th ed. (1969), p. 89 and Windfield and Jolowicz on Tort , 9th ed. (1971), p. 348. I have used the word "certain," but "certainty" is obviously a very difficult matter to establish. It may be that, as one of the textbooks suggests, the proper test in this connection is "virtual certainty" which is another way of saying a very high degree of probability, but the authorities are not, I venture to think, altogether satisfactory in this

> respect. Whatever the precise test may be, it would, I think, be impossible to apply the exception to the present case. The exception is squarely based in the reported cases on express or implied authority: see in particular the judgment of Blackburn J. in *Harris* v. *James*, 35 L.T. 240, 241. The exception is not based on cause and probable result, apart from express or implied authority. In the present case, the corporation let no. 25, Walpole Road to the Scotts as a dwelling house on conditions of tenancy which expressly prohibited the committing of a nuisance, and, notwithstanding that the corporation knew the Scotts were likely to cause a nuisance, I do not think it is legitimate to say that the corporation impliedly authorised the nuisance.

Claim in unjust enrichment

The plaintiff relies upon the principle of unjust enrichment to make a restitutionary claim for the cost of extinguishing the fire and the remedial work done at the scene of the fire. That allegation is purely derivative. The claim for restitution proceeds from the assumption that Sun Life Trust is "responsible" for the costs of extinguishing the fire and of the remedial work at the site, that Sun Life Trust has not fulfilled those responsibilities and that, by virtue of having failed to fulfil those responsibilities, Sun Life Trust has "received the benefit" of having the Province of Ontario bear the cost of that work.

Sun Life Trust has no responsibility for those costs. There is no basis for the claim in unjust enrichment.

By virtue of s. 369 of the *Municipal Act*, R.S.O. 1980, c. 302, the Attorney General has priority over Sun Life Trust by way of a lien for clean-up costs on the mortgaged property. To that extent only the mortgagee not in possession suffers as a result of the fire.

In summary, none of the claims asserted disclose a genuine issue to be tried. The motion is allowed and the action against Sun Life Trust is dismissed with costs. I will fix the costs. Counsel may fax to me his bill of costs and a supporting affidavit of justification. The respondent may reply to the applicant's submissions.

Order accordingly.

BRITISH COLUMBIA PROVINCIAL COURT

[Indexed as: R. v. Shell Canada Products Ltd.]

Between Regina, and Shell Canada Products Limited

Homes, Prov. Ct. J.

Burnaby, May 30, 1992

***Fisheries Act*, R.S.C. 1985, c. 1985, s. 36(3) – charge under s. 36(3) – spill of 16,000 gallons of a mixture of petroleum fuel – guilty plea**

Sentencing – fine of $65,000 – objective of sentencing is deterrence both general and specific – increase in fines under the Act indicates seriousness of protecting marine resource

Summary: The accused company was charged under s. 36(3) of the *Fisheries Act* and pleaded guilty to the charge.

Following a shut down for regular maintenance at the Shellburn Refinery in Burnaby, on start up of the splitter unit, there was a spill of about 16,000 gallons of a mixture of petroleum fuel, which escaped into the Burrard Inlet. The maintenance had included the removal of a coke build up in the splitter unit using a temporary line and pipe leading to a drum. Following the procedure, the pipe was either to be removed or sealed. This was not done despite a check of the system. There was a quick response by the company to the spill and there was efficient clean up. The spilled substance, called "Scot Mix" is deleterious to fish. The Burrard Inlet is water frequented by fish. Following the spill, the company changed its checklist to ensure such an incident does not happen again.

The learned judge found that the paramount aim of sentencing is deterrence, both specific and general. Recent increases in fines under the Act indicate the value Parliament has attached to the protection of the marine environment. Factors considered by the court in sentencing were: the company cleaned up the spill quickly and efficiently; the company was remorseful; the incident was not a willful act; there was no explanation as to why the company did not disconnect the pipe; the company pleaded guilty to the charge; the company had hired someone to deal with emergency response and prevention; there was potential for harm to the environment; the company has taken steps to ensure the accident does not happen again; and there was no back-up system in place in the event that a mistake was made.

Held: Fine of $65,000.

REASONS/MOTIF:

John D. Cliff, Counsel for the Crown
Robert J. Lesperance, Counsel for the Defence

[para1] HOMES PROV. CT. J.:-- The defendant company is charged with a violation of s. 36(3) of the *Fisheries Act* and pleaded guilty.

[para2] There was a spill of 16,000 imperial gallons of a mixture of petroleum fuel at the Shellburn Refinery in Burnaby on May 30, 1991.

[para3] The facts are as follows.

[para4] The refinery was shut down for a period of time for maintenance purposes and no oil product was being produced during this period. This maintenance included work done at what is referred to as the 'splitter unit' and this maintenance included the cleaning or removal of a coke build up in that part of the refinery. This is done by heating the furnace and pumping steam through the pipes with the result the coke burns off through a steam air decoking temporary line and to a pipe that leads to the drum. At the drum the steam condenses and clean water overflows from the drum onto the ground and the coke residue settles at the bottom of the drum. After the process is completed this pipe is to be removed or sealed.

[para5] The splitter unit was the last part of the refinery to be started up after being shut down. The pipe to the drum was not sealed off and when the unit was started up about 420 barrels or 16,000 imperial gallons overflowed from the drum. It happened at midnight and lasted for a period of under two hours.

[para6] There was a quick response by the company. The environmental control coordinator, Mr. Peters, was advised by 2:30 a.m. that the product had escaped to the Burrard Inlet. The Coast Guard and Burrard Clean were notified by 3:00 a.m. and arrived between 4:30 and 5:00 a.m. and a clean-up began. This was efficiently done. The spill was isolated to the Shellburn dock area and was kept to the south shore area of Burrard Inlet.

[para7] An investigation was done and it was discovered that:

1. Before starting up the unit the pipe described above was not sealed off.

2. The system was checked and the disconnection of the pipe to the drum was missed. It was also clear that as of May 29 the defendant knew that the pipe was still connected.

3. The operators in the control room were not monitoring closely the pressure build up in the splitter unit. If this had been done, the spill would have been detected earlier.

4. There was the absence of a berm at the splitter unit and drum to help contain any spillover.

[para8] The deleterious substance deposited was "Scot Mix" and is deleterious to fish at low concentrations of the product. A spill of petroleum products affect the surface water and goes into the water column. This affects fish on the water and in the water column and has a reduced survival rate in aquatic vegetation.

[para9] In the Burrard Inlet there are five types of salmon, two types of trout, herring, smelt, flat fish, Dungeness crab and shrimp. East of the Second Narrows where the refinery is situated, there are a large number of juvenile salmon and all fish use the entire inlet including inter-tidal waters and the foreshore. There is sport fishing and commercial fishing in the area and crab and shrimp that support a fishery in English Bay.

[para10] It is important to note that in this case there were no oiled or dead fish found and there were no juvenile salmon seen jumping as there were the year before.

[para11] The defendant company is a major manufacturer and markets refined petroleum products and petrochemicals. It employs in Canada some 7,000 at four refineries. In 1990 the parent company made a profit of $312 million dollars. No figures were available for 1991.

[para12] There is a record.

1. 1989 - Richmond - a spill of jet fuel and a joint submission for a fine and remedial work

2. 1991 - Montreal - for a 1989 spill caused by a faulty valve and again a joint submission for a fine and the company paid the clean-up bill

[para13] In sentencing, the paramount aim is deterrence both specific and general.

[para14] The company has had in court the Refinery Manager, the Operations Manager and the Environmental Coordinator. This indicates to me the company is remorseful, embarrassed and considers the matter of some importance.

[para15] Mr. Peters explained the steps taken by the company on the night in question. His job is to make sure there is compliance with legislation and proper emergency response. He is to be on the scene at any spill and also must ensure emergency preparedness. He is concerned about the environment and safety procedures, equipment integrity and, in effect, to make sure accidents do not happen.

[para16] When he arrived at the refinery that night the employees were already at the dock putting a boom out near the creek area and sealing the area off. The site itself is in an industrial area with no public access. Helicopter surveillance was made every day to ensure no product had escaped from the boom. The clean-up lasted four days. Burrard Clean was on the site with state-of-the-art oil spill equipment. This is a joint organization of five member oil companies and is to be used in case of spills by the oil companies. It can also be used by other parties. Shell pays a portion of the operating costs and in 1990 this was $200,000.

[para17] Mr. Peters' evidence is there was little damage to the environment. He states there were 10 - 12 maintenance checks and there has not been an incident before at the site. The work request to seal the pipe was simply not given in this matter. There was a physical inspection and this unsecured line was missed. When the control room noted the pressures and levels not increasing, the hooked up line or pipe was found and the refinery immediately ceased operation.

[para18] As a result of this incident the company has changed its checklist to ensure such an incident does not happen again. There has been an exchange of information - with other companies to alert every member as to what happened. The cost of the clean-up amounted to $187,000. The company cannot say there is no affect on the environment as a result of the spill.

[para19] I have read all of the cases provided and am aware of the amendments increasing the financial penalties for a first offence from $50,000 to $300,000 for a summary matter and for an indictable matter to $1,000,000. This indicates the value Parliament has placed on the marine environment and protection of it.

[para20] Deterrence is the main concern. It is acknowledged that the company acted with speed and with efficiency to clean up the spill after it happened. It is also acknowledged that the company has been embarrassed by the incident and by the fact they have been charged after some 60 years in the area. It was not a wilful act. But it seems to me that no explanation has been offered as to why nothing was done to disconnect the pipe following the notification of the 29th of May that the pipe was still hooked up. I am aware of the plea avoiding a lengthy and costly trial and of the following facts.

> - The company hired Mr. Peters to ensure all regulations were complied with, that the emergency response was available and the company prepared for an emergency - in effect, to make sure accidents did not occur.
>
> - The potential for harm to the environment as a result of the incident.
>
> - The company considers itself, as does the Court, a good corporate citizen and has taken steps to ensure this type of incident does not happen again.
>
> - Although a system of checking the unit was in place, there was nothing to ensure that if a mistake were made, that a back-up system was in place.

[para21] Taking all of these factors into consideration, I am satisfied that this principle of sentencing will be satisfied by a fine in the sum of $65,000.

NEWFOUNDLAND SUPREME COURT – TRIAL DIVISION

[Indexed as: Bank of Montreal v. Lundrigans Ltd.]

Between Bank of Montreal, Plaintiff, and Lundrigans Limited, First Defendant, and The Attorney General of Canada, Second Defendant, and Her Majesty in right of Newfoundland, Third Defendant

Hickman C.J.T.D.

June 8, 1992

***Fisheries Act*, R.S.C. 1985, c. F-14, s. 42 – application for order appointing a Receiver and Manager – plaintiff requested limitation on environmental liability for Receiver and Manager – order does not conflict with environmental legislation – environmental laws must be clear in their language to bind Receivers and Managers**

Summary: This concerns an application by the plaintiff for an order appointing a Receiver and Manager of the assets, property and undertaking of the first defendant. The first defendant did not oppose the order. The second and third defendants opposed the order on the basis that it would infringe on existing federal environmental legislation, including the *Fisheries Act*, and provincial environmental legislation and restrict the enforcement of orders and discharge by enforcement officers of their responsibilities under the legislation.

The court found that the first defendant was in breach of its covenants with the bank and that it was entitled to an order appointing a Receiver and Manager. The plaintiff was prepared to indemnify the proposed Receiver and Manager for liability under environmental laws up to the limit of the net proceeds realized by the Receiver and Manager for the offending property, but not for any more. The issue was whether the proposed order would infringe any environmental laws.

The learned justice found that the court had the inherent jurisdiction to deal with the application and to make the order requested. After reviewing relevant environmental legislation, including the *Fisheries Act*, he determined that barring specific legislation to that effect, the provisions do not impose environmental liability on the Receiver and Manager for damages caused by or in relation to an asset owned by a debtor prior to the appointment of the Receiver and Manager. For environmental laws to bind Receiver and Managers, the legislation would have to contain clear unmistakable language.

The court distinguished the case of *Panamericana* v. *North Badger Oil and Gas Limited* where a Receiver-Manager was found to be liable for the abandonment of certain oil and gas wells, on the basis that the Receiver-Manager had operated the wells for more than 3 years and the liability arose from the properties while in its possession. The learned justice added *in obiter* that the first defendant in this case would also be liable for the breach of environmental laws during the discharge of its functions.

Held: Order granted in the form requested.

REASONS/MOTIF:

John A. Baker, Counsel for the Plaintiff
The first Defendant was not represented
Glenn Roebothan, Counsel for the second Defendant
George P. Horan, Counsel for the third Defendant

HICKMAN C.J.T.D. (orally):-- This is an application by the plaintiff, The Bank of Montreal (the Bank), for an order appointing a Receiver and Manager of the assets, property and undertaking of the first defendant, Lundrigans Limited (Lundrigans). The terms and conditions of the order sought by the Bank are of the nature and kind required by the proposed Receiver and Manager, Coopers & Lybrand Limited (Coopers & Lybrand), before it will accept such appointment.

The second defendant, the Attorney General of Canada, and the third defendant, Her Majesty in Right of Newfoundland, have intervened on the grounds that such proposed order would infringe upon existing environmental legislation of the Parliament of Canada and of the Legislature of Newfoundland and restrict the enforcement of orders and the discharge by enforcement officers of their responsibilities as provided under such legislation.

The Bank has, over many years, been the principal financier of Lundrigans in connection with the many facets of its business operations in Canada. Lundrigans is incorporated under the *Canada Business Corporations Act* with its head office in Corner Brook, Newfoundland. It has, for a number of years, carried on business throughout Newfoundland and in other jurisdictions in many business sectors, including road construction, civil engineering construction, building supply sales, mixed and precast concrete production and sales, gypsum wallboard production and sales and residential, commercial and industrial real estate development.

The credit facilities extended to Lundrigans by the Bank are set out, in particular, in a loan agreement dated the 31st day of January, 1989 as amended by an agreement dated the 2nd day of March, 1990. The Bank is the holder of security in its favour executed by Lundrigans pursuant to the loan agreement which includes, inter alia, a demand debenture in the original principal amount of $30 million, dated January 31, 1989, as well as a general assignment of book debts of the same date and security, dated the 3rd day of December, 1987, given pursuant to section 178 of the *Bank Act*.

Prior to and as of February 12, 1992, Lundrigans was in default under the loan agreement in respect of its indebtedness to the Bank and by letter delivered to Lundrigans, dated February 14, 1992, the Bank demanded payment by March 6, 1992 of an indebtedness totalling, on account of principal and interest, at that time, of $23,972,196.71. The indebtedness was not paid by Lundrigans to the Bank on March 6, 1992 and has not been paid since that date.

As the result of further negotiations, a Forbearance Agreement, dated April 3, 1992, was executed by the Bank and Lundrigans under the terms of which Lundrigans acknowledged its indebtedness to the Bank and its default in payment thereof.

A specific condition of the Forbearance Agreement required that by April 7, 1992 the Government of Newfoundland would agree to fund the purchase of the Atlantic Gypsum division of Lundrigans by a third party and that the closing date would take place no later than April 22, 1992. The Bank was subsequently advised by Lundrigans that the Government of Newfoundland had failed to agree to provide assistance to a third party to purchase the Atlantic Gypsum division of Lundrigans and that as a result, Lundrigans was in breach of the Forbearance Agreement.

Lundrigans did not appear at this hearing but its President, Gilbert S. Bennett, by affidavit dated May 12, 1992, acknowledged Lundrigans' indebtedness to the Bank and its default in payment thereof. Lundrigans does not oppose the order sought by the Bank and by letter dated June 2, 1992, expressed the view that the most beneficial sales of the various operations of their company will result if the separate operations can be sold as going concerns and that the most beneficial sales will result if the Receiver and Manager is appointed on the terms sought by the Bank. The total indebtedness of Lundrigans to the Bank, at this time, is $24,500,000.

I find that Lundrigans are in breach of its covenants with the Bank and as a result thereof, the Bank is entitled to an order appointing a Receiver and Manager who will be charged with the responsibility of managing, protecting and disposing of some or all of the assets of Lundrigans.

Coopers & Lybrand has indicated to the Bank that it is not prepared to accept appointment as Receiver and Manager without the Bank agreeing to indemnify it against any claims arising out of the proper performance of its duties as Receiver and Manager. This is not an unreasonable request and one which I understand is required by any reputable Receiver and Manager before undertaking its obligations in that regard.

While the Bank is prepared to give Coopers & Lybrand, or any credible Receiver and Manager, the indemnification agreement sought, it is not prepared to give an open-ended guarantee to the proposed Receiver and Manager against any environmental orders which may be made by the Government of Canada or the Government of Newfoundland against the Receiver and Manager with respect to any of the properties coming into its possession. The Bank is prepared to give a guarantee to indemnify the Receiver and Manager against any liability arising under environmental laws with respect to any particular property over which the Receiver and Manager assumes control up to the limit of the net proceeds realized by the Receiver and Manager for such offending property. The Bank is not prepared to give an unlimited guarantee to indemnify Coopers & Lybrand against any Governmental order which may be made, in the future, with respect to environmental damages or offences caused by Lundrigans prior to the appointment of the Receiver and Manager.

The position taken by the first and second defendants is that the terms of the order proposed by the Bank and acceptable to Coopers & Lybrand, would, in effect, waive the application of and render ineffective federal and provincial legislation designed to protect the environment.

Rule 25 of the *Rules of the Supreme Court* 1986, dealing with application for Receiver and injunction, states in part:

> "25.01(1) The Court may appoint a receiver in any proceeding in which it appears to be just or convenient, and the appointment may be made either unconditionally or upon such terms and conditions as the Court thinks just."

Section 103 of *The Judicature Act* 1986 contains similar provisions.

Rule 29.10 of the Supreme Court 1986 when dealing with the powers of the Court on the hearing of applications, says, in part:

> "29.10 On a hearing of an application, the Court may on such terms as it thinks just
>
> (g) exercise such jurisdiction and grant any other order as it deems just."

I am satisfied that this Court has the inherent jurisdiction to deal with this application and can make such order, in accordance with existing laws as will reasonably protect any Receiver and Manager appointed by the Court. Any Receiver and Manager so appointed is, in effect, an officer of the Court and thereby subject to the directions and protection provided by the Court in accordance with the law. See *Toronto-Dominion Bank* v. *W-32 Corporation Limited*, [1983] 5 W.W.R. 476 (Alta Q.B.).

In *Bursey* v. *Bursey* (1966), 51 M.P.R. 286, Furlong, C.J. set forth, in a very accurate and scholarly manner, the very extensive powers of the Supreme Court of Newfoundland. He observed at p. 261:

> "I can only say then, that in my opinion the jurisdiction of this Court is sufficiently ample for it to dispose of all matters which came before it and which the Court is not specifically forbidden to consider."

See as well the decision of Dunfield, J. of this Court in *Hounsell* v. *Hounsell* (1948-49), 23 M.P.R. 59.

Having concluded that this Court has the jurisdiction to deal with this application and to make such order as is deemed to be just, I must now decide whether the proposed restrictions or limitations to be contained in the order sought by the Bank constitutes an infringement or breach of any of the environmental laws which have been enacted by the Parliament of Canada or the Legislature of Newfoundland.

The relevant Provincial Acts are: the *Waste Material Disposal Act*, R.S.N. 1990 cap. W-4; the *Waters Protection Act*, R.S.N. 1990 cap. W-5 and the *Department of Environment and Lands Act*, R.S.N. 1990 cap. D-11. The relevant federal legislation is the *Fisheries Act*, R.S.C., C.F-14 and the *Canadian Environment Act*, R.S.C. cap. 16. Section 17(2) of the *Waste Material Disposal Act* provides:

> "17.(2) Where the minister is satisfied that waste material has been deposited, poured, pumped, emptied or otherwise disposed of in violation of paragraph (1)(a), the minister may order

> (a) the occupant or the person having charge and control of the land or land covered by water, or building or structure on or in which the waste material was so disposed; or
>
> (b) the person who so disposed of the waste material,
>
> to remove the waste material and restore the land, building or structure to a condition satisfactory to the minister."

Section 5 of the *Water Protections Act* provides:

> "5. Where a thing or condition or practice is found in or upon the watershed or environment of waters which are or may reasonably be expected to be used for drinking or domestic purposes, or for bathing or swimming or as ornamental waters, and it appears likely that the thing or condition or practice does or may lead to the contamination, infection or fouling of those waters, the minister may by written order require the authority or person having control in the circumstances to remove or destroy the thing or to amend or prevent the condition or to stop the practice."

Section 28 of the *Department of Environments Act* gives the Minister of Environment and Lands power to issue stopping orders and serve same "on the owner or person in charge of the works or the operations effected by the stopping order ....".

The *Fisheries Act* imposes obligations and duties upon the person who "owns the deleterious substance or has the charge, management or control thereof ...". None of the provisions of these Acts referred to herein deal with or spell out definitively the duties and responsibilities of a Receiver and Manager who has been appointed to that position by the Court.

A Receiver and Manager, following appointment by the Court, is in a position to assume control of all or any of the debtor's property and assets for the purpose of disposing of same. The simple appointment of a Receiver and Manager does not deem him or it to be in possession of the debtor's property but places him or it in a position to take possession of any part of such property or assets he or it considers appropriate and necessary. In my view, barring specific legislation to that effect, the appointment by the Court of a Receiver and Manager, does not impose upon such Receiver and Manager liability for environmental misbehaviour or damages caused by or attributal to an asset or assets owned by a debtor prior to the appointment of such Receiver and Manager.

A case which some suggest may have dealt with the question whether Receivers and Managers or trustees in bankruptcy may be held personally liable for damages to the environment which were caused or existed prior to their appointment is the decision of the Court of Appeal of Alberta in *Panamericana* v. *Northern Badger Oil and Gas Limited*, 8 C.B.R. (3d) 31 (Alta C.A.) In that case, an oil company, which was licensed to operate oil and gas wells in Alberta, granted floating charge debenture security over certain assets, including the well, to the creditor. The company defaulted and the Court appointed a Receiver-Manager. A further order was subsequently made placing the company in bankruptcy.

The Energy Resources Conservation Board of Alberta advised the company, prior to the receiving order, that they required an undertaking that the wells would continue to be operated in accordance with the regulations and conditions of the well licenses and, in particular, that the wells could be abandoned when production was complete. The Receiver-Manager failed to comply with the Board's order with respect to the abandonment of the wells. The Court of Appeal of Alberta held that as the Company had an inchoate liability for the ultimate abandonment of the wells, such liability passed to the Receiver-Manager and that the Receiver-Manager would have to comply with provincial requirements even though the expense of abandoning the wells meant less money for distribution to creditors.

The issue in the *Panamericana* case was stated by Laycraft, C.J. at p. 43 to be as follows:

> "It is evident that the regulatory regime contained in these statutes and regulations contemplates that all wells drilled for oil or gas will one day be abandoned. That is so whether the well is unsuccessful or whether it produces large quantities of oil or gas. At some point, when further production is not possible or the cost of production of remaining quantities exceeds the revenue which could be obtained from it, the process of abandonment is required of the well licensee. In those situations where there is no solvent entity able to carry out the abandonment duties the wells become, in the descriptive vernacular of the oil industry, "orphan wells." Thus the direct issue in this litigation, in my opinion, is whether the *Bankruptcy Act* requires that the assets in the estate of an insolvent well licensee should be distributed to creditors leaving behind the duties respecting environmental safety, which are liabilities, as a charge to the public."

Again at p. 52, Laycraft, C.J. made the following findings and observations:

> "The receiver has had complete control of the wells and has operated them since May 1987, when it was appointed receiver and manager of them. It has carried out for more than three years activities with respect to the wells which only a licensee is authorized to do under the provisions of the *Oil and Gas Conservation Act*. In that position, it cannot pick and choose as to whether an operation is profitable or not in deciding whether to carry it out. If one of the wells of which a receiver has chosen to take control should blow out of control or catch fire, for example, it would be a remarkable rule of law which would permit him to walk away from the disaster saying simply that remedial action would diminish distribution to secured creditors.
>
> While the receiver was in control of the wells, there was no other entity with whom the board could deal. An order addressed to Northern Badger would have been fruitless. That is so because, by order of the court, upon the application of the debenture holder, neither Northern Badger nor its trustee in bankruptcy had any right even to enter the well sites or to undertake any operation with respect to them. Moreover, under the regulatory scheme for Alberta oil wells, only a licensee is entitled to produce oil and gas. The receiver cannot be heard to say that, while functioning as a licensee to produce the wells and to profit from them, it assumed none of a licensee's obligations.

> I must also consider the contention, which found favour in the Court of Queen's Bench, that the receiver or bankruptcy trustee managing and operating oil and gas wells need not, and, indeed, is forbidden, to obey the general provincial law governing property of that description. Put another way, this argument states that the general provincial law regulating the operation of oil and gas wells in Alberta is invalid to the extent that it purports to govern a receiver or bankruptcy trustee in possession of such wells."

The Court of Appeal of Alberta concluded at p. 54 as follows:

> "In my opinion, the receiver, the manager of the wells with operating control of them, was bound to obey the provincial law which governed them."

In my view, the principles enunciated in the *Panamericana* case are not applicable to the facts before this Court in the within application. In *Panamericana* the Receiver operated the wells for more than three years under the licenses and authorization of the appropriate regulatory authorities and in accordance with the regulations governing the operation and abandonment of oil wells.

The liability imposed upon the Receiver-Manager by the Court of Appeal of Alberta was with respect to obligations incurred by the Receiver-Manager in the carrying out of its duties with respect to the operation and subsequent sale of the properties which had come into its possession. It equally follows that should the Receiver and Manager appointed to take over the assets of Lundrigans breach any environmental laws during the discharge of its functions and responsibilities, that such Receiver and Manager will be answerable for same and subject to any direction given by the appropriate regulatory regime.

The primary issue in this case, however, concerns any environmental damage, both latent or otherwise, which may have been caused by one or more of the Lundrigan enterprises prior to that company's default of its obligations to the Bank and prior to the Receiver and Manager being appointed.

In my view, the principles of vicarious liability for prior environmental damage or offences cannot be extended to a Receiver and Manager who is charged with the responsibility of controlling and realizing on all or some of the assets of what is, in essence, a bankrupt company.

I hasten to point out that what the Bank is asking for in this application is that the Receiver and Manager's liability for environmental damages be limited to the amount realized on the sale of that particular asset by the Receiver and Manager. The Bank is not asking for immunity from penalties arising out of any environmental damage which has occurred earlier but rather, simply asks that in order to enable the Receiver and Manager to perform its duties, liability for environmental damage be limited to the value of the offending assets.

The Receiver and Manager, in accordance with the law, will, under the terms of the proposed order, examine the various assets and enterprises of Lundrigans and decide which assets it wishes to take control or possession of and may, in time, dispose of all or some of the assets as going concerns or otherwise.

To that legitimate end, it is necessary that a Receiver and Manager be placed in a position where it can decide whether to operate a particular enterprise or enterprises of Lundrigans with a view to disposing of same as a going concern.

The position taken by Coopers & Lybrand is, in my view, reasonable. A potential Receiver and Manager must know what risks it is taking before embarking upon its duties or accepting an appointment in that regard. The same applies to the creditor who is called upon to indemnify the Receiver and Manager against any claims arising out of the Receiver and Manager's discharge of its responsibilities.

In *Re Lamford Forest Products Ltd.,* 63 B.C.L.R. (2d) 388, Harvey, J. of the British Columbia Supreme Court, when dealing with the necessity that reputable trustees be available to deal with the winding up and disposing of the assets of insolvent estates, said at p. 396:

> "The balancing of values in this case falls in favour of protecting the health and safety of society over the rights of creditors, as it did in the *Bulora* and the *Panamericana* case, but there is also a need in modern society for trustees to take on the duty of winding up insolvent estates. The evidence before me indicates that no trustee can be found who will take on the bankruptcy of Lamford without a guarantee that he or she will be entitled to trustee's fees to be deducted from the amount paid out under the order, and will have no personal liability for the costs of cleanup of the contaminated site as discussed supra. In keeping with the findings I have made when answering the questions, I direct that in the event that there are insufficient funds to meet the requirements of the order, the payment of funds pursuant to the order must be subject to a reduction equal to the amount of the trustee's fees."

Counsel for the second and third defendants very properly and very clearly raised issues with respect to their interpretation of the proposed order and its effect upon the ability of appropriate governmental authorities to enforce environmental regulations and requirements against the Receiver and Manager. In order to deal with that, I must first ask the question, what is the clear intention of the Federal and Provincial environmental legislation which is law at this time? None of the relevant legislation clearly provides that a Receiver and Manager shall be personally liable for any environmental contaminant found upon the property that comes into its or his hands. There is nothing in environmental legislation which defines what "charge and control", "authority or having control" or "charge, management or control" over land and assets, particularly as it relates to the peculiar responsibilities of a Receiver and Manager who, upon his appointment, becomes an officer of the Court.

In my view, the appointment of a Receiver and Manager by the Court, and his subsequent assumption of control of all or some of a debtor's assets, does not, under existing legislation, render him liable to pay money or perform work ordered by environmental authorities in excess of the value of or monies received from the sale of the individual asset which caused the environmental damage. Legislation intended to impose unlimited liability on a Receiver and Manager would have to say so in clear and unmistakable language which is not the case with existing environmental legislation.

Counsel for the Attorney General of Canada argues that the issuance of the proposed order would exempt the Receiver and Manager from potential liability under environmental laws and would allow such Receiver and Manager to operate with impunity. The provisions of the proposed order does not exempt the Receiver and Manager from any liability imposed under existing environmental legislation for any offending acts of Lundrigans prior to the appointment of the Receiver and Manager. In my view, the relevant legislation does not impose liability upon Receiver and Managers or trustees in bankruptcy for environmental offences committed, or violations of environmental legislation by a debtor or bankrupt prior to their appointment.

Counsel for the second defendant suggested that section 42 of the *Fisheries Act* imposes absolute civil liability upon any person who deposits a deleterious substance in waters frequented by fish and that the proposed order if granted would vary such legislative provisions in their application to the Receiver and Manager. That section of the *Fisheries Act* also confers certain rights upon third parties. In my view, that section or sections of the *Fisheries Act* do not apply to a Receiver and Manager for environmental offences or violations committed by the debtor prior to his or its appointment.

There is nothing in the terms of the proposed order which could or is designed to relieve the Receiver and Manager from any penal provisions of any environmental legislation. Even if such was attempted, it would be invalid at law.

Counsel for the second and third defendants both agree that it is not in the public interest to encourage the abandonment of sites or assets by a Receiver and Manager or by a debtor who is unable to find a Receiver and Manager prepared to accept an appointment to that position. They both express concern over the possibility that the proposed order will relieve the Receiver and Manager from liability under existing environmental legislation. For the reasons given, I find such is not the case.

Counsel for both the second and third defendants submit that the potential problems and potential exposure to liability for environmental violations which concern the proposed Receiver and Manager should be left for adjudication, sometime in the future, should same occur. Unfortunately, that is not an option open to this Court in view of the refusal of the proposed Receiver and Manager to accept appointment without these concerns being addressed and where possible, taken care of in the order.

This order does not breach existing environmental or other laws.

In this case, the Bank has, since default by Lundrigans, continued to advance sufficient funds to enable the debtor company to continue its operations and to meet its payroll. If a Receiver and Manager is appointed under the terms proposed, then some of the operations of Lundrigans will continue, at least for a time, with the resultant employment of those on the payroll of such enterprises. If, on the other hand, a Receiver and Manager is not appointed, at this time, the Bank, understandably, is not prepared to continue financing the operation of Lundrigans with the result that the entire operations will immediately shut down, all employees will be laid off and the assets and enterprises abandoned subject only to the Bank's continuing security. As a result, there would be no one responsible for any environmental cleanup required as a result of the operations of the various businesses by Lundrigans. This would not be in the public interest.

In my view, it is very much in the public interest that as many of the operations of Lundrigans continue as going concerns in the hope that they may be sold at realistic prices and, hopefully, continue in operation in the future. It is also in the public interest that there be someone to whom Governmental authorities may look to for compliance with existing environmental legislation.

For the reasons given, I conclude:

1. That the application is just and reasonable.

2. It is not in violation of any existing laws, either federal or provincial.

3. That it is very much in the public interest that the operations or portions thereof of Lundrigans be maintained as a going concern and kept operating for as long as possible.

I am prepared, therefore, to grant the order sought by the Bank in the form submitted.

FEDERAL COURT OF APPEAL

[Indexed as: Eastmain Band v. Canada (Federal Administrator) #1]

Between The Attorney General of Québec, Appellant (Intervenor), and The Eastmain Band et al., Respondents (Applicants), and Raymond Robinson et al., Mis-en-cause (Respondents), and Hydro-Québec, Mis-en-cause (Intervenor)

Decary J.

Ottawa, September 25, 1992

***Fisheries Act*, R.S.C. 1985, c. F-14, ss 35, 37 – application to take notice of or admit evidence of Minister's use of ss 35(2) and 37(2) – motion denied**

Civil procedure – leave to file materials as new evidence – evidence must be practically conclusive – must be conclusive on the issue facing the courts

Summary: This is a motion by the applicants for directions from the court respecting their reference to certain materials relating to the regulatory regime, or alternatively, for leave to file the materials as further evidence. The materials consisted of (1) a letter to the Minister of Fisheries and Oceans requesting information on the frequency of his use of ss 35(2) and 37(2) of the *Fisheries Act* and examples of authorizations or orders made under the sections and (2) the Minister's response to this request.

The motion related to an action by the applicants for mandamus against the Minister compelling him to apply the EARP Order to the Eastmain I hydroelectric Project. The applicants argued that Court decisions since the proceedings were initiated, in particular *Friends of the Oldman River Society* v. *Canada (Minister of Transport)* and *Alcan Aluminum Ltd.* v. *Minister of the Environment*, might change the conditions necessary to trigger the EARP Order. Further, the Court might want to consider the regulatory scheme to protect fish habitat established under the *Fisheries Act* and should either take notice of or admit the materials to assist in understanding the regulatory scheme.

The court rejected both the main motion and the alternative motion. With regard to the main motion, the learned justice found that the materials were not of a kind the court takes judicial notice of. As to the alternative motion, the court will look at the Act itself for an interpretation of the legislative scheme; how the Minister has exercised his authority is irrelevant to that interpretation. Furthermore, the evidence did not meet the test of being "practically conclusive" in that it was not conclusive on the issue before the courts: whether the legislative functions are a decision making responsibility within the EARP Order.

Held: Application dismissed.

REASONS/MOTIF:

Charles-François Jobin, Counsel for Procureur général du Québec
Franklin Gertler and Kathleen Lawand, Counsel for the Eastmain Band et al.
Jean-Marc Aubry, Q.C. and René Leblanc, Counsel for Raymond Robinson et al.
Georges Emery, Q.C. and Michel Yergeau, Counsel for Hydro Québec

DECARY J. (Reasons for Order and Order):-- This is a motion by the applicants Eastmain Band et al. for directions regarding reference by them to materials relating to the regulatory regime allegedly established under the *Fisheries Act*, (R.S.C. 1985, c. F-14) (the *Act*) and in the alternative for leave to file these materials as further evidence pursuant to Rule 1102.

The materials in question are the following ones:

> (i) A letter dated July 2, 1991 to the Honourable John Crosbie, Minister of Fisheries and Oceans, from the West Coast Environmental Law Association (the Association), asking the Minister the number of times the Minister has used subsections 35(2) and 37(2) of the *Fisheries Act* and seeking examples of authorizations given under subsection 35(2) and orders made under subsection 37(2);
>
> (ii) The answer given to the Association on behalf of the Minister by the Assistant Deputy Minister of Fisheries and Oceans, on August 28, 1991, including copies of two examples of authorizations given under subsection 35(2).

It will be useful to reproduce the relevant provisions of the *Act*.

Section 35 reads:

> 35. (1) No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.
>
> (2) No person contravenes subsection (1) by causing the alteration, disruption or destruction of fish habitat by any means or under any conditions authorized by the Minister or under regulations made by the Governor in Council under this Act.

Section 37 reads:

> 37. (1) Where a person carries on or proposes to carry on any work or undertaking that results or is likely to result in the alteration, disruption or destruction of fish habitat, or in the deposit of a deleterious substance in water frequented by fish or in any place under any conditions where that deleterious substance or any other deleterious substance that results from the deposit of that deleterious substance may enter any such waters, the person shall, on the request of the Minister or without request in the manner and circumstances prescribed by regulations made under paragraph (3)(a), provide the Minister with such plans, specifications, studies, procedures, schedules, analyses, samples or other information relating to the work or undertaking and with such analyses, samples, evaluations, studies or other information relating to the water, place or fish habitat that is or is likely to be affected by the work or undertaking as will enable the Minister to determine

> (a) whether the work or undertaking results or is likely to result in any alteration, disruption or destruction of fish habitat that constitutes or would constitute an offence under subsection 40(1) and what measures, if any, would prevent that result or mitigate the effects thereof; or
>
> (b) whether there is or is likely to be a deposit of a deleterious substance by reason of the work or undertaking that constitutes or would constitute an offence under subsection 40(2) and what measures, if any, would prevent that deposit or mitigate the effects thereof.

(2) If, after reviewing any material or information provided under subsection (1) and affording the persons who provided it a reasonable opportunity to make representations, the Minister or a person designated by the Minister is of the opinion that an offence under subsection 40(1) or (2) is being or is likely to be committed, the Minister or a person designated by the Minister may, by order, subject to regulations made pursuant to paragraph (3)(b), or, if there are no such regulations in force, with the approval of the Governor in Council,

> (a) require such modifications or additions to the work or undertaking or such modifications to any plans, specifications, procedures or schedules relating thereto as the Minister or a person designated by the Minister considers necessary in the circumstances, or
>
> (b) restrict the operation of the work or undertaking,

and, with the approval of the Governor in Council in any case, direct the closing of the work or undertaking for such period as the Minister or a person designated by the Minister considers necessary in the circumstances.

(3) The Governor in Council may make regulations

> (a) prescribing the manner and circumstances in which any information or material shall be provided to the Minister without request under subsection (1); and
>
> (b) prescribing the manner and circumstances in which the Minister or a person designated the Minister may make orders under subsection (2) and the terms of the orders. ...

The proceedings in this appeal, as far as they relate to the instant application, are relatively simple. On July 6, 1991, the applicants commenced proceedings in which they sought, inter alia, a mandamus against the Minister of Fisheries and Oceans as the head of an "initiating department" to apply the federal environmental and social impact assessment process established by the *Environmental Assessment and Review Process Guidelines Order*, SOR 84-467 (the EARP Order) to the Eastmain I Hydroelectric Project.

In deciding on October 2, 1991, that mandamus should issue against the Minister, the Motions Judge relied, inter alia, on the judgment of this Court in *Friends of the Oldman River Society* v. *Canada (Minister of Transport)*, ([1990] 2 F.C. 18 (C.A.)), for the proposition that the responsibilities of the Minister of Fisheries and Oceans pursuant to the *Fisheries Act* relating to the protection of fisheries and fish habitat attract the application of the EARP Order.

On January 23, 1992, the Supreme Court of Canada rendered judgment in the *Oldman case* ([1992] 1 S.C.R. 3). La Forest J. (speaking for the Court on this issue), had occasion to address the meaning to be given to the term "decision making responsibility" which is comprised in the conditions set out at section 6 of the EARP Order for the triggering of impact assessment. In so doing, according to the applicants, La Forest J. said variously (at pp. 47-50) that there is a "decision making responsibility" for the purposes of the EARP Order where there is an "affirmative regulatory duty", "legal duty or obligation", "some degree of regulatory power over the project", "regulatory authority", "a legislatively entrenched regulatory scheme" and "a regulatory procedure".

On May 8, 1992, this Court rendered judgment in *Alcan Aluminium Ltd.* v. *Minister of the Environment*, No. A-560-91, in which it considered the legal conditions necessary for the triggering of the EARP Order after *Oldman*.

The applicants submit that both decisions may have the effect of modifying to some extent the legal conditions necessary for the triggering of the application of the EARP Order and that in these proceedings this Court may feel obliged to further consider the nature of the regulatory scheme for the protection of fish habitat which, they argue, is established under the *Fisheries Act*. Hence, they contend, this Court may and should consider or take notice of or alternately permit the addition as evidence of the materials referred to earlier as an aid in understanding the nature of the regulatory scheme allegedly established by the *Fisheries Act*.

. . . .

With respect to the main motion, that seeking directions confirming that the materials be considered or taken notice of by this Court, suffice it to say that they are not of a kind a Court takes judicial notice of. This part of the motion, in my respectful view, is totally devoid of merit and is dismissed.

With respect to the alternate motion, that seeking leave to file the materials as new evidence, counsel for the applicants would like the Court to assume that there is a regulatory scheme under the *Act*. Either that scheme is to be found in the provisions of the *Act*, and more particularly subsections 35(2) and 37(2), in which case the *Act* speaks for itself, the Court will interpret the Act and how often the Minister has exercised in the past his legislative authority is irrelevant to that interpretation. Or the scheme is to be found in Regulations, and I was informed at the hearing that there are no such regulations. The evidence sought to be added at this late stage could not therefore serve any useful purpose.

Furthermore, as the evidence is not "practically conclusive" on the issue to be determined, the application does not meet the third part of the three-part test developed by the Ontario Court of

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Appeal in *Mercer* v. *Sijan*, ((1976) 72 D.L.R. (3d) 464 at 469) and adopted by this Court in *Optical Recording Corp*. v. *Minister of National Revenue*, ((1987) 79 N.R. 23 at 26 (F.C.A.)) and in *Can. Council of Prof. Eng*. v. *Lubrication Engineers, Inc*., ([1990] 2 F.C. 525 at 532 (F.C.A.)) [Footnote: The three-part test is the following one: the court must be satisfied that the evidence was not discoverable before the end of the trial by reasonable diligence; the evidence must be wholly creditable; and it must be practically conclusive on an issue in the action. See also *Harper* v. *Harper*, [1980] 1 S.C.R. 2 at 13.]. The evidence at the most is conclusive on the fact that the Minister does indeed exercise his legislative functions; it is not conclusive on the issue facing the Court, i.e. whether or not these legislative functions constitute a "decision making responsibility" within the meaning of the EARP Order.

I am of the view that this alternate motion should also be dismissed.

ORDER

The present motion for directions and the motion in the alternative on reception of further evidence are dismissed with costs.

NOVA SCOTIA COUNTY COURT

[Indexed as: R. v. Wentworth Valley Developments Ltd.]

Between Her Majesty the Queen, Appellant, and Wentworth Valley Developments Limited, David K. Wilson and Peter Wilson, Respondents
MacDonnell Co. Ct. J.

County of Cumberland, October 14, 1992

***Fisheries Act*, R.S.C. 1985, c. F-14, ss 35(1), 78.2, 78.6 – defendants charged under s. 35(1) – operated a ski facility – was silt in water following a heavy rain – charges dismissed at trial on the basis of the due diligence defence – appeal dismissed**

Defences – due diligence – defendants took all reasonable care to prevent run-off – heavy rainfall was unexpected and not reasonably foreseeable

Criminal procedure – role of appeal court in reviewing findings of fact – test is whether verdict is unreasonable or cannot be supported by evidence

Summary: The defendant corporation owned a recreational facility including a ski hill in Wentworth, Nova Scotia. The individual defendants were directors and officers of the corporation. They were charged under s. 35(1) of the *Fisheries Act* with unlawfully carrying on a work or undertaking resulting in the harmful alteration of fish habitat.

The defendants were charged following an employee of the Department of Fisheries and Oceans noticing silt running into the Wallace River which could be traced back to the defendants' operations. The Department had previously advised the defendants of siltation problems originating from the recreational property. During remodelling work on the bunny hill the previous summer, the defendants had undertaken various steps to halt the erosion that was causing the silt to run into the river. There was very heavy rainfall in the area and there was some evidence that the siltation resulted from a collapse of a waterway bank in the area of the bunny hill.

The learned trial judge dismissed the charges against all accused. He found as a matter of fact that the heavy rainfall contributed to the erosion problem which was sudden and unexpected and that the defendants had taken all reasonable precautions to prevent the run-off and movement of silt into the watercourse. The court found that the learned trial judge's decision appealed from was reasonable and one that he could have reached on the evidence before him.

Held: Appeal dismissed.

REASONS/MOTIF:

A.J. Morley, Counsel for the Appellant
W.D. Dunlop and C.F. Fox, Counsel for the Respondents

MACDONNELL CO. CT. J.:-- The Respondents were acquitted by His Honour Judge Clyde F. Macdonald, a Judge of the Provincial Court of Nova Scotia, on the following charge:

> "that DAVID K. WILSON of Truro, County of Colchester, Province of Nova Scotia, and PETER WILSON and WENTWORTH VALLEY DEVELOPMENT LIMITED of Wentworth, County of Cumberland, Province of Nova Scotia, between the 1st day of April, 1990 and the 30th day of April, 1991, at or near Wentworth, in the County of Cumberland, Province of Nova Scotia, did unlawfully carry on work or undertaking that resulted in the harmful alteration of fish habitat, contrary to section 35(1) of the *Fisheries Act*, being Chapter F-14 of the R.S.C., 1985, as amended."

The Crown has appealed the Respondents acquittal on the following grounds:

> The Learned Trial Judge misdirected himself at law on the following:
>
> > (a) The burden to be discharged by the Defendant in providing the defence of due diligence;
> >
> > (b) The application of the test to establish the defence of due diligence and in particular:
> >
> > > (i) the learned trial judge misdirected himself by taking into consideration restorative measures carried out by the defendant(s) subsequent to the date of the alleged offence;
> > >
> > > (ii) and further the learned trial judge misdirected himself in holding that the defendants' obligation to exercise due diligence did not include an obligation to check the effectiveness of the defendants' preventive measures.

Sections 35(1); 78.2 and 78.6 of the *Fisheries Act*, c. F-14, R.S.C. 1985; as amended, read:

> 35.(1) No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.
>
> 78.2 Where a corporation commits an offence under this Act, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to and guilty of the offence and is liable on conviction to the punishment provided for the offence, whether or not the corporation has been prosecuted.
>
> 78.6 No person shall be convicted of an offence under this Act if the person establishes that the person
>
> > (a) exercised all due diligence to prevent the commission of the offence, or

> (b) reasonably and honestly believed in the existence of facts that, if true, would render the person's conduct innocent.

Judge Macdonald in delivering his decision concluded by stating:

> "Applying the test enunciated in *R.* v. *City of Sault Ste. Marie*, I find that the defendant company, Peter Wilson and David K. Wilson, have established on the balance of probabilities, by credible evidence, that they exercised all due diligence in the circumstances.
>
> In reference to Section 78.6 of the *Fisheries Act*, I find that the defendant company, Peter Wilson and David K. Wilson, exercised all due diligence to prevent the commission of the offence.
>
> For the above reasons, I therefore find the three defendants Peter Wilson, David K. Wilson and Wentworth Valley Development Limited, NOT GUILTY of the charge under Section 35(1) of the *Fisheries Act*."

The issue in this Appeal is:

> "Did the Trial Judge properly interpret the evidence presented at trial in finding that the Respondents exercised all due diligence to prevent the commission of the offence?"

There is little dispute about the facts as disclosed by the evidence, which can be summarized as follows:

Wentworth Valley Development Limited, the corporate Respondent, operates a recreational facility including a ski area at Wentworth, in the Province of Nova Scotia. The Respondents, David K. Wilson and Peter Wilson, are directors and officers of the corporate Respondent.

On November 21, 1988, Charles A. MacInnes, an employee of the Department of Fisheries and Oceans Canada, noticed siltation in the Wallace River, which he traced back to the corporate Respondents' recreational property. This fact was brought to the attention of the manager of the corporate Respondent.

During the summer of 1990, an area of the recreational property owned by the corporate Respondent, known as "The Bunny Hill" was changed by bulldozing large amounts of earth to alter the grade, and install two rope tow lifts for the ski operation.

In July of 1990, Fisheries Officers again contacted an employee of the corporate Respondent, and informed him that siltation flowing into an unnamed tributary of the Wallace River from the corporate Respondents' recreational property was causing a problem with fish habitat.

Evidence at trial indicated that in the summer of 1990 the corporate Respondent, in conducting its remodelling of the bunny hill were aware of problems due to erosion causing water and silt to be discharged from its property into the adjoining waterways. The corporate Respondent took certain steps to halt this erosion, including in the Fall of 1990 placing hay bales in certain water courses to limit the flow.

On April 9th, 1991, Lewis Thompson, an employee of the Department of Fisheries and Oceans Canada, noticed silt was running into the Wallace River. He traced the source of this silt back to the corporate Respondents' recreational property. Being unsuccessful in contacting officials of the corporate Respondent, he contacted Vicky Rogers, an employee of the corporate Respondent, who indicated that she would bring the problem to the attention of the operations manager of the Corporate Respondent.

On April 30th, 1991, a number of employees of the Department of Fisheries and Oceans returned to the area, and established that an unnamed tributary running into the Wallace River was a fish habitat, and that the fish habitat had been harmfully altered as a result of the silt flowing from the corporate Defendants' recreational property into the said tributary.

Rainfall records introduced into evidence indicated that there had been very heavy rainfall in the area on April 9th, and 10th, with lesser amounts on April 21st and April 22nd, 1991. There was some evidence that the silt flowing into the unnamed tributary came from a collapse of a waterway bank in the area of the bunny hill on the Corporate Respondents recreational property as a result of the heavy rain on the 9th or 10th of April.

Following the laying of the charges against the Respondents, they took steps to stabilize the situation by installing geotech material and increasing the height of a riprap installation and succeeded in correcting the problem which had led to the damage to the fish habitat.

The Trial Judge in delivering his decision made the following findings of fact:

> "(1) heavy rainfall contributed to the erosion problem. The erosion problem happened suddenly;
>
> (2) the defendant company, Peter Wilson and David K. Wilson, took all reasonable precautions to prevent water run-off and movement of silt or sedimentation into the unnamed tributary;
>
> (3) the erosion problem was indeed an unexpected occurrence and was not reasonably foreseeable by the defendant company, Peter Wilson and David K. Wilson;
>
> (4) the silt in the unnamed tributary was due to the sudden erosion of the ski hill gulley, accompanied by an extremely heavy outflow of water that overtaxed the existing drainage system on the ski hill property. The drainage system could not accommodate the overflow and the mixture of sediment and water flowed into the unnamed tributary;
>
> (5) the defendant company, Peter Wilson and David K. Wilson, took comprehensive and calculated steps to prevent the run-off of silt into the unnamed tributary, albeit, the end result was failure."

Counsel for both the Crown and the Respondents, in their submissions referred to the due diligence test as set out in *R.* v. *City of Sault Ste. Marie* (1978) 40 C.C.C. (2d) 353. In delivering the judgment of the Supreme Court of Canada, Dickson, J. (as he then was) stated at p.373:

> "In this doctrine it is not up to the prosecution to prove negligence. Instead, it is open to the defendant to prove that all due care has been taken. This burden falls upon the defendant as he is the only one who will generally have the means of proof. This would not seem unfair as the alternative is absolute liability which denies an accused any defence whatsoever. While the prosecution must prove beyond a reasonable doubt that the defendant committed the prohibited act, the defendant must only establish on the balance of probabilities that he has a defence of reasonable care."

At p. 374 he stated:

> "Offences in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act prima facie imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event."

Then, at p. 377 he stated:

> "Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system. The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself."

Crown Counsel submits that the Respondents had available to them the resources and expertise to prevent the commission of the offence, and were forewarned of the possibility of silt damaging the fish habitat in the adjoining streams and brooks, however, they did not take any steps to prevent the occurrence. It is further submitted that the verdict of the Trial Judge was unreasonable in light of the evidence, and in particular his finding that straw bales were reconstituted. It is argued that neither the corporate Respondent or its principals or employees took any steps to prevent the occurrence, despite their warning by officials from the Department of Fisheries and Oceans. It is suggested that the circumstances leading to the damage to the fish habitat in the unnamed tributary were reasonably foreseeable, and had been brought to the attention of the Respondents, and thus the due diligence test as set out in various cases had not been met.

In support of the Crown's submissions are cited *R.* v. *D'Entremont* (1990) 96 N.S.R. (2d) 176; *A.* v. *D'Entremont* (1990) 96 N.S.R. (2d) 177; and *R.* v. *Yebes* (1987) 59 C.R. (3d) 108.

Counsel on behalf of the Respondents submits that the burden of proof as to whether the Respondent took all reasonable care depends on the finding of fact of the Trial Judge. Provided that the proper test has been considered by the Trial Judge, his findings of fact should not be reversed on Appeal.

It is argued on behalf of the Respondent that the Trial Judge only referred to work done by the Respondents to correct the situation following the laying of the charge and did not rely on this fact in arriving at his decision. It was only referred to by the Trial Judge to show that the Respondents took every step available to them once the unanticipated erosion occurred.

It is argued that the Respondents took all appropriate steps to monitor the operation of the precautionary methods set up to deal with the run off, and that the system worked. However, the heavy rain on April 9th and 10th was an event which could not be anticipated, and was the cause of the damage found by the officers at the end of that month. As the Trial Judge found that the Respondents had taken all reasonable precautions to guard against erosion, thus the requirements of Section 78.6 of the *Fisheries Act* had been met, and the Appeal should be dismissed.

A review of all the evidence produced at Trial, indicates that the Trial Judge made findings of fact based on the evidence introduced at the Trial.

Findings of fact cannot be reversed on Appeal, unless the verdict is unreasonable or cannot be supported by the evidence. The test to be applied in determining on Appeal whether a verdict is reasonable was set out by the Supreme Court of Canada in *R.* v. *Yebes* (1987) 36 C.C.C. (3d) 417, where McIntyre, J. stated at p. 430:

> "The concept of reasonableness is clearly expressed in the section which speaks of an unreasonable verdict. Therefore, curial review is invited whenever a jury goes beyond a reasonable standard. In my view, then *Corbett* is the governing case and the test is "whether the verdict is one that a properly instructed jury acting judicially, could reasonably have rendered.
>
> The function of the Court of Appeal, under s. 613(1)(a)(i) of the *Criminal Code*, goes beyond merely finding that there is evidence to support a conviction. The court must determine on the whole of the evidence whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered. While the Court of Appeal must not merely substitute its view for that of the jury, in order to apply the test the court must re-examine and to some extent reweigh and consider the effect of the evidence. This process will be the same whether the case is based on circumstantial or direct evidence."

It is well established law that findings of fact cannot be reversed by an Appeal Court unless there be some palpable and overriding error on the part of the Trial Judge.

As stated by Ritchie, J., in *Stein Estate et al.* v. *The Ship "Kathy K" et al.* (1975), 6 N.R. 359 at p. 366:

> "While the Court of Appeal is seized with the duty of re-examining the evidence in order to be satisfied that no such error occurred, it is not, in my view, a part of its function to substitute its assessment of the balance of probability for the findings of the judge who presided at the trial."

Mr. Justice Spence in *R.* v. *Stewart* (1976), 12 N. R. 201 said at pp. 211-2:

> "...I do not think that any appellate court is free to vary the findings of fact made by the learned trial judge or inferences which the learned trial judge drew from the evidence unless one can say that there was no evidence upon which the learned trial judge could make such a finding. ..."

We have been invited, in effect, to substitute findings of facts contrary to those of the trial judge. Again see Ritchie, J., in "*Kathy K*" at p. 364:

> "I think that under such circumstances the accepted approach of a court of appeal is to test the findings made at trial on the basis of whether or not they were clearly wrong rather than whether they accorded with that court's view of the balance of probability."

In *R.* v. *Starvish,* 79 N.S.R. (2d) 137, MacDonald, J., in paragraph 8 said:

> "Judge Reardon had the distinct advantage of seeing and hearing the various witnesses including Capt. Starvish. He concluded that the latter had taken all the care that a reasonable man might be expected to take under the circumstances to avoid crossings into Canadian waters. In other words Judge Reardon found that Capt. Starvish had shown that he was not negligent in crossing the Hague line. This was a finding of fact. It was reasonable and it was supported by the evidence. It is my opinion therefore that Judge Haliburton exceeded his jurisdiction in reversing such finding. In *R.* v. *Gillis* (1981), 45 N.S.R. (2d) 137; 86 A.P.R. 137; 60 C.C.C (2d) 169 (C.A.), Mr. Justice Jones speaking for this court said that although the Crown has a right of appeal on questions of fact in summary conviction cases, a verdict of acquittal should only be set aside where it is "unreasonable or cannot be supported by the evidence". See also: *R.* v. *Harper*, [1982] 1 S.C.R. 1; 40 N.R. 255, at p. 14; 65 C.C.C. (2d) 193, at p. 210."

After reviewing and re-examining the transcript of evidence, and after giving full consideration to the submissions of Counsel, I find that the Trial Judge's verdict is reasonable and one that he could have reached on the evidence before him. I find no error on the part of the Trial Judge respecting his assessment of the facts or application of the law.

The Appeal is dismissed, with costs to the Respondents which I fix at $750.00.

BRITISH COLUMBIA PROVINCIAL COURT

[Indexed as: R. v. West Fraser Mills Ltd. #1]

Between Her Majesty the Queen, and West Fraser Mills Ltd. and Larry Gardner

de Villiers Prov. Ct. J.

Williams Lake, October 27, 1992

***Fisheries Act*, R.S.C. 1985, c. F.-14, ss 34, 35(1), 36(3), 78.3, 82 – definition of "agent" under s. 78.3 – use of definition for civil law requiring ability to contract and dispose of property is too narrow – would not effect intentions of Parliament – Crown need only prove logging undertaken by or on behalf of corporation – no need to prove identity of persons responsible – they are all agents for the purpose of s. 78.3 – evidence of harm under s. 35(1) is sufficient – there is no need to balance harm and benefits**

Agency – definition for purpose of s. 78.3 of *Fisheries Act* – civil law standard too narrow

Due diligence – evidence – relevancy – Crown evidence of terms of cutting permit can be evidence of accused's knowledge if due diligence defense raised

Summary: This is a preliminary inquiry into charges under the *Fisheries Act*: Count 1 alleged the carrying on of an undertaking, being logging along side a creek, that resulted in the harmful alteration, disruption, or destruction of fish habitat, contrary to s. 35(1) and Count 2 alleged the permitting of the deposit of a deleterious substance, being logging debris, in water frequented by fish, contrary to s. 36(3). Because the information was sworn more than 6 months after the dates of the alleged offences, the Crown asked that the proceeding be treated as indictable.

No evidence was entered that the logging debris was a deleterious substance, and in respect to Count 2, there was no case to meet for the accused.

Respecting Count 1, the Crown alleged that the accused corporation had committed the offence as principal, through the "governing executive authority" of the corporation. However, the evidence in this regard was too flimsy to support a conviction. Since there was also insufficient evidence that the offence was committed by an employee, proof that the offence was committed by an agent was necessary.

Evidence was introduced as to the logging in the area and the accused's exclusive permit to log the area during the relevant time periods. There was also evidence of the presence on site of a logging contractor who had worked as a contractor for the accused. The issue focused on whether the contractor could be considered an agent for the purposes of s. 78.3 of the *Fisheries Act*.

The learned judged concluded that the definition of "agency" used in a civil law context, requiring the ability to make contracts to dispose of property on behalf of the principal, is too narrow in

respect to this provision. It would not give effect to Parliament's intention in enacting s. 78.3 which is to expand the basis of penal liability for corporations, by making them responsible for the actions of their agents and employees, even where they are not identified. S. 78.3 reverses the common law onus by making a corporation liable unless it establishes absence of knowledge or consent on the part of the corporation management.

In respect to s. 35(1), there was sufficient evidence that the logging resulted in harmful alteration, disruption or destruction of fish habitat. Evidence of activities that were harmful to the life processes of the fish were sufficient; there was no need to balance the harm against any beneficial effects of the logging activities. The offence occurs once the harm has been done. Further, there is no need to prove that the harm is contemporaneous as long as the harm was the direct result of the work or undertaking, whether the result is immediate or delayed.

Held: The accused, West Fraser Mills Ltd., was committed to trial on the charge under s. 35(1) of the *Fisheries Act*; the charge under s. 36(3) was dismissed. Before conclusion of the preliminary inquiry, a stay of proceedings was entered against the accused, Larry Gardner.

REASONS/MOTIF:

E. Bayliff, Counsel for the Crown
A. Czepil, Counsel for West Fraser Mills Ltd.
N. Callegaro, Counsel for Larry Gardner

DE VILLIERS PROV. CT. J.:-- A preliminary inquiry has been concluded, and these are my reasons for committing the accused, West Fraser Mills Ltd., for trial on Count 1 of the information, and discharging it in respect of Count 2.

Background of proceedings

The information, as amended, reads:

> Count 1
>
> West Fraser Mills Ltd. and Larry Gardner, between the 1st day of January A.D. 1991 and the 10th day of May, A.D. 1991, at or near Horsefly Lake in the Province of British Columbia, did carry on a work or undertaking, to wit: logging along an unnamed creek in Cutting Permit CP 310 of Forest Licence A20021, that resulted in the harmful alteration, disruption or destruction of fish habitat, contrary to S. 35(1) of the *Fisheries Act*, R.S.C. c. F- 14, as amended.
>
> Count 2
>
> West Fraser Mills Ltd. and Larry Gardner, between the 1st day of January A.D. 1991, and the 10th day of May, A.D. 1991, at or near Horsefly Lake in the Province of British Columbia, did permit the deposit of a deleterious substance, to wit: logging debris, in water

> frequented by fish, to wit unnamed creek in Cutting Permit 310 of Forest Licence A200211 contrary to S. 36(3) of the *Fisheries Act*, R.S.C. c. F-14 as amended."

The accused entered pleas of not guilty, and demanded further particulars, which were ordered, and filed. The trial was then set to commence before me, as a summary conviction proceeding, but I noticed that the information had been sworn on November 19, 1991, more than the normal six months' statutory time limit after the dates of the alleged offences. I drew counsel's attention to this and to S. 82 of the *Fisheries Act* which, by way of exception to the normal six months' limit, enabled summary conviction proceedings to be instituted within two years after the time when the Minister became aware of the subject matter of the proceedings, and which provided for proof of the Minister's knowledge to be furnished by means of a certificate.

As a practical expedient I suggested to Crown counsel that the trial could commence as a summary conviction proceeding if she would give me her undertaking to file a certificate from the Minister or his deputy before the close of the Crown's case. However, she was not willing to do so, and instead requested that I treat the proceeding as indictable, thus avoiding the time limits problem. Accordingly, applying *R.* v. *Karpinski* (1957) S.C.R. 343, I set aside the pleas of the accused, and they elected to be tried before a Supreme Court judge without a jury. The preliminary inquiry then proceeded.

Before the conclusion of the inquiry, Crown counsel directed a stay of proceedings against the accused, Gardner.

At the conclusion of the evidence, Crown counsel applied for an amendment of the particulars filed by the deletion of certain allegations, and I granted her application on the assumption that it was within my jurisdiction to do so. If necessary, counsel has indicated that she might deal with the matter again at the trial, and perhaps frame her indictment so as to incorporate the remaining particulars.

The accused did not call any evidence. I asked Ms. Bayliff to address me first on Count 2, and Mr. Czepil to address me first on Count 1.

Count 2

Ms. Bayliff concedes, properly, that there is no evidence that the logging debris was a deleterious substance, as that term is defined in S. 34 of the *Act*. On the contrary, an expert called for the Crown, testified that the debris would be nutritious. Therefore the accused has no case to meet in respect of Count 2.

Count 1

Mr. Czepil makes a number of submissions in respect of Count 1. He says that there is no evidence that the accused was the culprit or that the logging that was admittedly done by somebody, resulted in the harmful alteration, disruption or destruction of fish habitat. Alternatively, he says that any evidence put forward by the Crown to establish its prima facie case is so flimsy that the accused ought not to be put on trial.

Sufficiency of evidence

S. 548 of the Criminal Code requires me to order the accused to stand trial if in my opinion there is sufficient evidence to put the accused on trial. In assessing the sufficiency of the evidence I must leave the weight to be attached to it to the trial judge. I must accept that all the Crown witnesses are credible and trustworthy. The authority for this proposition is *United States of America v. Sheppard* (1976) 30 C.C.C. (2d) 424, S.C.C., an extradition case, which has generally been accepted as laying down the test for committal at the end of preliminary inquiries. In that case, however, the majority cited, with apparent approval, at pp. 433 - 434, a decision of the Federal Court of Appeal, Re Commonwealth of Puerto Rico and Hernandez (No. 2) (1973) 15 C.C.C. (2d) 56; 42 D.L.R. (3d) 541, in which that court had refused to extradite an accused on the basis of flimsy evidence of identification, even though the integrity of the eye witness was apparently not called into question. I therefore accept Mr. Czepil's submission that I must not commit the accused for trial if the Crown evidence, though presented by credible and trustworthy witnesses, is "so flimsy as to make it inconceivable" that the accused should be put on trial. I will measure the Crown evidence by that standard.

Agency Issue

Mr. Czepil's first argument can be paraphrased by saying that the accused can only be found guilty if there is evidence that the offence was committed by its employee or agent, since a corporation, as an abstraction, cannot itself commit the offence. He refers to S. 78.3:

> "In any prosecution for an offence under this *Act*, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused, *whether or not the employee or agent is identified* or has been prosecuted for the offence, unless the accused establishes that the offence was committed without the knowledge or consent of the accused." [my emphasis]

In her reply Ms. Bayliff argues, inter alia, that there is evidence that the accused corporation itself committed the offence as a principal. In accordance with the principles outlined in the Canadian Dredge case, to which I will refer later, it is necessary for the Crown to prove, if it wishes to fix the accused corporation as a principal with criminal liability, that the offence was committed by the "governing executive authority" of the corporation. The evidence in this regard that the operations superintendent and contracting supervisor were seen on the scene of the logging is at best speculative. It is too flimsy to form the basis of a conclusion that the governing executive authority of this accused knew, authorized or participated in the logging of the creek banks. Nor has there been any evidence that the logging was carried out by employees of the accused. If the accused committed the offence there must be proof that it did so by an agent.

There is ample evidence that logging occurred in the area alleged, that such logging occurred sometime in early 1991, and that it resulted in the banks of the creek being denuded of trees. The most cursory examination of the photographs confirms this. They present a scene of "clear-cut" devastation. However, the Crown did not produce any eye witness to the actual logging operation.

Crown witnesses have testified that the accused was granted an exclusive permit to log the area between January 1, 1991 and December 31, 1991. During that time the witness Norman de Wynter saw a Mr. Neels on the site in the presence of two of the accused's officials, including the contracting supervisor. Mr. de Wynter knew that on occasions in the past Mr. Neels had done logging as a contractor for the accused, and simply assumed that Neels was the contractor this time too. Neither Neels nor any other person having knowledge of the facts was called to testify that Neels was the accused's contractor.

Mr. Czepil argues that, even if an inference can be drawn that Neels was a contractor for the accused, there was no evidence that Neels was an agent within the meaning of S. 78.3. He does not concede that a contractor is ipso facto an agent, and he relies on a decision of His Honour Judge Cashman, as he then was, in the County Court case of *Pacific Logging Company Ltd.* v. *The Queen*, [1974] 5 W.W.R. 523.

In that case, also decided under the *Fisheries Act*, the accused corporation had contracted logging to another company, its wholly owned subsidiary, and the latter had subcontracted the job to yet another company whose employees did the actual logging. There was no evidence of the terms of the contract or subcontract, but there was evidence that the accused corporation's logging supervisor gave directions as to how the work was to be done. At pp. 527 - 528 His Honour said:

> "It is not seriously contended that MacKenzie Logging was an agent of the appellant and in my view no such relationship arises in the circumstances of this case. The contract does not grant any authority, expressed or implied, in [sic] MacKenzie Logging to act on behalf of the appellant and certainly there is no evidence that the appellant ever ratified anything done by MacKenzie Logging."

His Honour then proceeded to analyze the evidence to determine whether the relationship between the corporations could be characterized as that of employer and employee, and, not surprisingly, concluded that it could not. He held that the logging had been done by independent contractors, and acquitted the accused corporation.

By analogy Mr. Czepil argues that there is no evidence to show that whoever did the logging for this accused was anything other than an independent contractor, since the Crown has failed to produce evidence of the contents of the contract between the accused and the logging contractor.

If Judge Cashman's decision is authority for the proposition that an independent contractor cannot be an agent for the purpose of S. 78.3 then I must give effect to it, unless it has been overruled by or is inconsistent with a subsequent decision of a higher appellate court, or has been affected by legislation.

Ms. Bayliff points out that at the time of that decision the offence could only be committed "knowingly", and that the focus of Judge Cashman's reasoning was on that mental element. While there is merit in what she says, I do not think it disposes of the issue. Even as the law then was, the offence would have been made out if the proven agent of the accused had committed it knowingly, subject to the due diligence defence.

It is clear from the passage cited that Judge Cashman applied the normal civil law concept of principal and agent to the relationship of the parties, and that he did not consider whether that rather narrow concept was what Parliament had intended in its reference to agents in the *Fisheries Act.* One definition of an agent in civil law is put forward in Fridman's Law of Agency, 6th ed., p. 9:

> "Agency is the relationship that exists between two persons when one, called the agent, is considered in law to represent the other, called the principal, in such a way as to be able to affect the principal's legal position in respect of strangers to the relationship by the making of contracts or the disposition of property."

The essence of the civil law relationship is therefore the power to make contracts or dispose of property on behalf of the principal. It may be questioned how the making of a contract or the sale of property can form part of the physical activity of polluting the environment.

In my respectful opinion, at least two subsequent cases of higher authority are inconsistent with the Pacific Logging decision, and therefore render that decision non-binding.

In *Penderville Apts. et al* v. *Cressey Development Corporation* (1990) 43 B.C.L.R. (2d) 57, a civil matter, the British Columbia Court of Appeal has held that the power to bind another person by a contract creates one kind of agency, but there is another kind. Anyone who does something for another is, for that very limited purpose, an agent.

The Penderville reasoning becomes clearer if one considers the root of the English noun "agent". It is the Latin verb "agere", which means "to do". In that broad sense anybody who does something for another at the request of the latter is the latter's agent.

In *Canadian Dredge & Dock Co. Ltd.* v. *The Queen* (1985) 19 D.L.R. (4th) 314 Mr. Justice Estey, delivering the decision of the Supreme Court of Canada, said, at p. 323:

> "As a corporation may only act through *agents* there are basically only three approaches whereby criminal intent could be said to reside or not reside in the corporate entity: ..." [my emphasis].

His Lordship thus clearly gave "agents" a meaning in criminal law that is not restricted to the making of contracts on behalf of a principal.

These two decisions are inconsistent with the restrictive approach adopted in Pacific Logging.

As with all statutes, the meaning and purpose of Parliament must be ascertained in the interpretation of S. 78.3. Would it give effect to Parliament's intention to proscribe activities that harm fish if the word "agent" is confined to a person who makes contracts on behalf of another? I think not.

Such a restrictive interpretation might, of course, make sense in respect of other kinds of offences, where the actus reus itself consists of a contract. The Canadian Dredge case affords a good illustration. In that case the actus reus was the rigging of contract bids. But it would make no sense that an accused corporation would be held criminally liable only for an unlawful "work or undertaking" done by an agent who can bind it by contract but not for a work or undertaking done by an independent contractor whom it engages for the very purpose of executing the work or carrying on the undertaking that constitutes the offence.

In my opinion the purpose of Parliament in enacting S. 78.3 was not to limit, but to expand the basis of penal liability, particularly of corporations, by making them responsible for the acts of their agents and employees, even where such agents and employees are not identified. Without such legislation corporations would not be liable unless the offence could be shown to have been committed at the express direction of the senior management of the accused corporation.

In the Canadian Dredge case Mr. Justice Estey made a thorough analysis of corporate criminal liability in Canadian law. At pp. 335 to 337 he explained that, unlike in tort law, a corporation is not vicariously liable for the crimes of all or any of its agents and employees committed within the scope of their employment by the corporation. By the "identity doctrine" it is only liable where the crime is committed or directed by a person or persons who have the governing executive authority of the corporation, and can thus be regarded as its alter ego. Low level employees and other agents of the corporation (using that term in a broad sense) who commit offences without the direct or indirect participation of the upper management do not make the corporation vicariously liable to prosecution (though they may be personally prosecuted). The corporation is only liable if the Crown can prove that there was senior management participation. The corporation does not have the burden of disproving participation.

S. 78.3 reverses the common law onus, and makes the corporation liable unless it establishes absence of knowledge or consent on the part of the corporation management.

In the case at bar the Crown need only prove that the logging work or undertaking was carried out by or on behalf of the accused corporation. It does not have to identify the actual actor or actors responsible. They may have been employees of the accused, or independent contractors or their employees. All of them would be agents for the purpose of S. 78.3. As the Crown is not by S. 78.3 required to prove the identity of the accused's agents it follows that Mr. Czepil's submission that there must be evidence of the contractual relationship between the accused and its contractor must fail.

In this case there is sufficient evidence, if believed, to enable the trial judge to find, inferentially or otherwise, that all the logging in the cutting permit area between January 1 and May 10, 1991 was done by or at the behest of the accused as the sole holder of the cutting permit issued by the Ministry of Forests.

Harmful alteration, disruption or destruction of fish habitat

I must now determine whether there is sufficient evidence that the logging resulted in "harmful alteration, disruption or destruction of fish habitat".

Fish habitat

The first issue relates to the existence of "fish habitat" in the area concerned. "Fish habitat" is defined in S. 34 as spawning grounds and nursery, rearing, food supply and migration areas on which fish depend directly or indirectly in order to carry out their life processes. There has been ample evidence to the effect that the unnamed creek in the cutting permit area conformed to this definition. Fish spawn in it, and live there part of their lives.

Effect of the logging

Mr. Czepil argues that there has been no evidence that the logging resulted in harmful alteration, disruption or destruction of fish habitat.

First, he says, if anything harmful has been done, then no offence is committed unless the total impact of the work or undertaking is harmful. He then proceeds to review the evidence with a view to establishing that on balance the fish habitat has been improved by the logging activity by, for example, raising the temperature of the water, and that this improvement cancelled out the effect of the removal of large trees as a source of food for insects on which the fish in turn feed. Ms. Bayliff, however, submits that an offence has been committed if anything harmful has been done to any of the life processes of the fish, whatever the overall effect. I agree with her, and will therefore not balance the evidence, if any, of harmful activity, against the evidence of beneficial activity in order to determine whether in the final result fish were or are better off as a result of the logging. To give effect to Mr. Czepil's submission would require the Crown to prove that the ultimate effect of a work or undertaking is to cause harm. Such a work or undertaking may be a continuous activity, in which event a prosecution would have to await the ultimate conclusion of the work or undertaking, perhaps many years after the event, in order to determine whether on balance harm has been done. That could not have been Parliament's intention. Not only the destruction but also the alteration and disruption of habitat are made offences. Alteration or disruption may be only temporary. Whatever harm is done may in the fullness of time be cured, either by the work of people or by the processes of nature.

I hold that as soon as harm has been done the offence has been committed, even if the overall result of the activity is immediately or ultimately beneficial.

Alternatively, Mr. Czepil submits, if there is evidence of a harmful result the evidence falls short of showing that the result was immediate or contemporaneous, and he submits that on a proper construction of the statute, no offence is committed if the harmful results occur at a later date. I disagree. It is sufficient for the Crown to prove that the harmful result was a direct consequence of the work or undertaking, whether the result was immediate or delayed.

Lastly, Mr. Czepil submits that if the harm done is no more than would occur in the natural processes of nature no offence is committed. I can see no basis for sustaining that submission. As Ms. Bayliff says, nature can be extremely vicious. "Nature" cannot be punished for its earthquakes, floods, droughts, lightning fires, or hurricanes. Mankind can and will be if its activities interfere with the beneficial processes of "nature".

Evidence of harmful effect

In the particulars filed the Crown has alleged that the harmful effect consisted of the deposit of debris and the cutting of streamside vegetation to less that 3 metres' height. Because of the deposit of debris the Crown says that the movement of fish was obstructed, the space available for fish in the wetted portion was reduced, and the diversion of the flow of the creek into its banks increased the erosion of the stream banks. Because of the cutting down of tall streamside vegetation, insects and organic material from overhanging vegetation were no longer available as a food source for fish or aquatic organisms, and, again, there was an increased potential for the erosion of stream banks. It is only necessary for the Crown to adduce sufficient evidence of one or more of the particulars supplied to warrant the committal of the accused.

The Crown led evidence of the terms of a cutting permit, issued to the accused pursuant to its forests licence. This permit enabled the accused to cut trees in the cutting permit area, except for two "leave strips", a 20 metre wide strip along the edge of Horsefly Lake, and 30 metres on each side of the creek. The main purpose of the strip along the lake was cosmetic, so as to screen the destruction of the forest from the eyes of people passing the area in boats on the lake or looking across the lake. The main purpose of the strip along the creek was to protect the creek and the fish in it. I questioned the relevance of this evidence at the outset, but, having heard all of it, conclude that it would be relevant if the accused raises the defence of due diligence, since it indicates that the accused corporation knew both that the creek was a spawning ground, and that the purpose of the leave strips along its banks was to protect fish. The accused is, of course, not on trial for breaking the terms of its cutting permit, and the Crown cannot rely on that evidence to prove its case under the *Fisheries Act* except by way of rebuttal of the due diligence defence, if raised.

Mr. Czepil, with justification, criticizes the expert evidence of Mr. Lirette as being based mostly on hypotheses rather than on his own observations, and points to the lack of on-site measurements of depths, widths and rates of flow of the waters in the stream or of the gradients of the creek, all of which evidence the Crown could and ought to have tendered. Therefore, he says, Mr. Lirette's evidence is so flimsy as to be dismissed.

It is not necessary for me to comment on Mr. Lirette's evidence. On assessing the evidence of Messrs. Clapp, Chapman and Lay, and disregarding the contents of the cutting permit or the effect of its breach, it will be possible for the trial judge to conclude that the debris left was in several places so dense as to make it impossible for mature fish to swim through to their spawning grounds, that the cutting of the tall trees removed a source of food for fish, and that the erosion of the stream banks will accelerate because of the death of the root systems that previously held the soil firm, thus causing the stream to dissipate so widely as to become too shallow for fish.

The weight to be attached to this evidence is for the trial judge to decide, but it cannot be regarded as flimsy. I find that it is sufficient to put the accused on trial for the offence charged in Count 1. Accordingly I commit the accused for trial on Count 1 of the information, as amended, and discharge it in respect of Count 2.

FEDERAL COURT OF APPEAL

[Indexed as: Eastmain Band v. Canada (Federal Administrator) #2]

Between The Attorney General of Québec, Appellant (Intervener), and The Eastmain Band, the Nemaska Band, the Mistassini Band, the Cree Regional Authority, the Grand Council of the Crees (of Québec), Chief Kenneth Gilpin, Deputy Chief Lawrence Jimiken, Chief Henry Mianscum and Philip Awashish, Respondents (Applicants), and Raymond Robinson, the Honourable Jean Charest, the Honourable Tom Siddon, the Honourable Jean Corbeil and the Honourable John Crosbie, Mis-en-cause (Respondents), and Hydro-Québec, Mis-en-cause (Intervener)

Marceau, Décary and Létourneau JJ.

Montréal, November 20, 1992

Fisheries Act*, R.S.A. 1985, c. F-14 – ss 20, 21, 22, 29, 35(1), 35(2), 37, 40 – whether s. 35(2) operates to trigger the *Environmental Assessment and Review Process Guidelines Order* – distinction required between "construction" and "carrying on" an activity – because s. 35 creates a criminal offence, it must be construed narrowly – evidence of the destruction of fish habitat is required if s. 35(2) is to trigger the *Environmental Asssessment and Review Process Guidelines Order

Environmental Assessment Review Process Guidelines Order, SOR/84-467 – whether process triggered by federal Ministers of Indian Affairs and Northern Development, Minister of the Environment, Minister of Fisheries and Oceans and Minister of Transport – precondition to triggering process is a positive statutory duty found in a federal statute – federal fiduciary responsibility to aboriginals does not trigger review process – general responsibilities of the federal Minister of the Environment do not trigger review process

***Navigable Waters Protection Act*, R.S.C. 1985, c. N-22, s. 5 – whether s. 5 can trigger *Environmental Assessment and Review Process Guidelines Order* – provision contains an affirmative duty to regulate – require evidence of navigability of river**

Treaties – interpretation – interpretation in favour of aboriginals – principles adopted for historical treaties may not apply to modern treaties – fiduciary relationship – interpretation of modern land claim agreements – must take into interests and intentions of all parties

Summary: This is an appeal and a cross-appeal of a judgement concerning an application for mandamus requiring the procedure in the environmental review regime in s. 22 of the *James Bay and Northern Quebec Agreement* to be triggered and requiring federal ministers to refer a hydro-electric proposal to a public environmental review under the *Environmental Assessment and Review Process Guidelines Order*.

This action concerns the construction of a hydro-electric powerplant (Eastmain 1) on the Eastmain River, including a dam, spillway and a number of dykes as well as a reservoir of approximately 630 km^2. The place where the project is to be constructed is within the territory governed by the land claim agreement known as the *James Bay and Northern Quebec Agreement* (Agreement) signed between Quebec, Canada, Hydro-Québec, and the Cree and Inuit communities of Quebec, with other parties. The aboriginal parties (respondents/applicants) brought an action in the Federal Court Trial Division asking for a writ of mandamus to be issued to force the Administrator under the Agreement to trigger the environmental review regime in the Agreement and to compel the ministers (the four mis-en-cause/respondent ministers) to refer the project for a public environmental review under the *Environmental Assessment and Review Process Guidelines Order*. Mr. Justice Rouleau dismissed the motion as it related to the Administrator but ordered that a writ of mandamus issue against each of the four ministers.

The court addressed five issues. (1) The question of whether Eastmain 1 is a part of Le Complexe La Grand, such that under the Agreement it is not subject to the environmental regime established in the Agreement, is answered in the affirmative by the court in agreement with the learned motions judge.

(2) In respect of the question of whether Eastmain 1 is an "addition and/or substantial modification" to the Complexe and thereby considered a future project and subject to the environmental regime under the Agreement, the court answered no, also agreeing with the learned motions judge. The motions judge made a finding of fact that would only be overturned if shown to be patently unreasonable; the conclusion was based on evidence, and there was no basis for interfering with it.

(3) The third issue concerned the matter of whether, assuming the application of the environmental regime under the Agreement, the process being placed under the federal Administrator was inapplicable because it would be a project under provincial jurisdiction. Although it was not necessary to answer this question in light of the court's answer to the previous questions, the learned justice determined that the intent of the parties, based on the terms of the Agreement, was to avoid any overlap between the review processes.

Issues four and five concern the applicability of the *Environmental Assessment and Review Process Guidelines Order* (Order) to Eastmain 1. (4) Issue four asks whether the Order could apply to Eastmain 1. The court concluded that because the Government of Canada gave its irrevocable consent to the Le Complexe La Grande through the Agreement and subsequent legislation, it gave its irrevocable consent to the project. This consent was given in 1975; because the Order was adopted in 1984, its provisions cannot apply retroactively to the project.

(5) The fifth issue asks whether the conditions in the Order were been triggered with respect to one or all of the ministers. Although it was not necessary to answer this question in light of the answer to the fourth issue, the learned justice concluded that the requirements for triggering the Order set out in *Oldman River Society* v. *Canada (Department of Transport)* (*Oldman*) and *Alcan Aluminum Limited et al.* V. *Carrier-Sekani Tribal Council* were not met in respect of the responsibilities of any of the four ministers.

With respect to the Minister of Indian Affairs and Northern Development, there is no federal law or affirmative duty with respect to the project even though the federal government owes a fiduciary duty to the aboriginals. Similarly, the Minister of the Environment has no independent decision-making power over the carrying out of the project. If the decision-making power of the Minister of Fisheries and Oceans were to be triggered, it would arise from s. 35 of the *Fisheries Act* whose purpose is to protect "fish habitat"; it was never alleged that construction of the project threatens fish habitat as defined in s. 34 of the Act. With respect to the responsibilities of the Minister of Transport, although the *Oldman* case found an affirmative duty to regulate in s. 5 of the *Navigable Waters Protection Act*, in this case, there was insufficient evidence as to the navigability of the Eastmain River.

Held: The appeals were allowed and the cross-appeal by the Aboriginal appellants was dismissed.

REASONS/MOTIF:

Jean Bouchard and Pierre Lachance, Counsel for the Appellant
James O'Reilly, Peter W. Hutchins, Franklin S. Gertler and Kathleen Lawand, Counsel for the Respondents
René Leblanc and Jean-Marc Aubry, Counsel for the Mis-en-cause, Raymond Robinson et al.
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DECARY J.:--

Facts and proceedings

On November 11, 1975, Quebec, Canada, Hydro-Québec and the Cree and Inuit communities of Quebec, together with other parties, signed a land claim agreement known and designated as the James Bay and Northern Quebec Agreement (the Agreement). By the terms of the Agreement itself (s. 2.5), it had to be approved, given effect to and declared valid by an Act of the parliament of Canada and by an Act of the National Assembly of Quebec; this was done by the *James Bay and Northern Quebec Native Claims Settlement Act*, S.C. 1976-77, c. 32, and the *Act* approving the Agreement concerning James Bay and Northern Quebec, S.Q. 1976, c. 46, respectively.[See Note 1 below.]

Note 1. See *Cree Regional Authority* v. *Canada*, [1991] 3 F.C. 533 (C.A.).

The Agreement put an end to the legal proceedings brought against the first phases of the development of northern Quebec and, inter alia, confirmed the construction of Le Complexe La Grande (the Complexe) which, according to the Attorney General of Quebec (the appellant), included the Eastmain 1 (or EM 1) hydroelectric development project (the Project) then being studied.

On September 26, 1990, the Government of Quebec authorized the mis-en-cause/intervener, Hydro-Québec (Hydro-Québec) to [TRANSLATION] "conduct the preliminary study for the Eastmain 1 hydroelectric development, and to carry out exploration, studies, scientific surveys and all other activities preceding the development" (Order in Council 1371-90, Gaz. Off. du Québec, 17 October 1990, Part 2, at pp. 3746-47).

Construction of the Project includes, inter alia, construction of a hydroelectric powerplant on the Eastmain River, a dam, a spillway and a number of dykes, as well as a reservoir of approximately 630 km2.

The place where the Project is to be constructed is located in the territory governed by the Agreement.

On May 14, 1991, the respondents/applicants (the aboriginal parties), arguing the probable environmental impact of the Project on matters under federal jurisdiction such as fisheries, navigable waters, migratory birds, Indians and lands reserved for the Indians, served notice on the mis-en-cause/respondent federal Administrator appointed under Section 22 of the Agreement (the Administrator) and the four mis-en-cause/respondent ministers (the ministers) to fulfil the duties imposed on them under Section 22, in the case of the Administrator, and under the Environmental Assessment and Review Process Guidelines Order (the Order) (SOR/84-467, 22 June 1984), in the case of the ministers.

On June 6, 1991, the aboriginal parties asked the Federal Court Trial Division to issue a writ of mandamus to force the Administrator to trigger the procedure under the environmental review regime (the Regime) provided in Section 22 of the Agreement, and also to compel the ministers to refer the Project for the public environmental review provided in the Order.

On October 2, 1991, Mr. Justice Rouleau allowed the motion in part. First, he concluded that the project is part and parcel of Le Complexe La Grande (1975); that as such it must be subject to the specific provisions for the Complexe set out in the Agreement; and that, by virtue of the provisions of paragraph 8.1.2 of the Agreement, it is exempt from the Regime. Accordingly, he dismissed the motion as it related to the Administrator.

Second, he concluded that the Project is subject to the Order and that in this case the conditions for the Order to apply had been fulfilled; accordingly, he ordered a writ of mandamus to issue against each of the four ministers. However, he dismissed the aboriginal parties' request that a public review be carried out, considering it premature at that point, and stated that he had no power to suspend the project.

The Attorney General of Quebec (A-1071-91), the Attorney General of Canada (A-1072-91) and Hydro-Québec (A-1073-91) have appealed the portion of Mr. Justice Rouleau's judgment which was unfavourable to them. The aboriginal parties have filed a cross-appeal. All of these appeals were joined in this case (A-1071-91).

To facilitate reading and comprehension of the reasons which follow, I have followed the sequence of the conclusions reached by Mr. Justice Rouleau, regardless of whether they prompted an appeal or a cross-appeal. I have further referred to each party by the same title throughout the reasons, the Attorney General of Quebec being described as the appellant, Hydro-Québec as Hydro-Québec, the federal Administrator, Mr. Robinson, as the Administrator, the federal ministers as the ministers and the aboriginal parties as the aboriginal parties. The Administrator and the ministers were represented by the Attorney General of Canada, to whom I will therefore make reference on occasion.

The questions raised

The questions raised by these appeals and this cross-appeal, which I shall answer, may be formulated as follows:

On the first issue, the mandamus issued against the federal Administrator under the Agreement

1. Is the Eastmain 1 project part of Le Complexe La Grande (1975) such that it is not, by virtue of the provisions of section 8.1.2 of the Agreement, subject to the environmental regime established in Section 22 of the Agreement? (cross-appeal)

2. If the answer is yes, is the Project an "addition and/or substantial modification" to the Complexe such that it is, by virtue of the provisions of section 8.1.3 of the Agreement, considered to be a future project and therefore subject to that environmental regime? (cross-appeal)

3. If the Project is subject to the Environmental Regime established by the Agreement, is the process placed under the responsibility of the federal Administrator inapplicable by virtue of the fact that it would be a project under provincial jurisdiction? (cross-appeal)

On the second issue, the mandamus issued against the ministers under the Order

4. Could the Guidelines Order be applied to the Project? (appeal)

5. If the answer is yes, have the conditions in which the Order is triggered been fulfilled in the case at bar with respect to one or all of the ministers? (appeal)

Principles of interpretation of the Agreement

The aboriginal parties spent considerable time arguing what they contended should be the principles of interpretation of an accord such as the Agreement, to which the Aboriginals are party. They contend the principle is that set out by Dickson J. as follows in *Nowegijick* v. *The Queen*, [1983] 1 S.C.R. 29, at p. 36:

> It seems to me, however, that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians.

Treaties

The appellant, Hydro-Québec and the Attorney General of Canada, assuming for the purposes of this case that the Agreement is a "treaty", strictly speaking, on which point I shall express no opinion, argue that while the first element of this rule - liberal construction - applies in the case of a modern treaty, the second element - doubtful expressions should be construed in favour of the Indians - does not apply. The point which they dispute, to borrow the expression used by counsel for Hydro-Québec, is that the Aboriginals have a constitutional right to have any ambiguity resolved in their favour.

We must be careful, in construing a document as modern as the 1975 Agreement, that we do not blindly follow the principles laid down by the Supreme Court in analyzing treaties entered into in an earlier era. The principle that ambiguities must be construed in favour of the Aboriginals rests, in the case of historic treaties, on the unique vulnerability of the aboriginal parties, who were not educated and were compelled to negotiate with parties who had a superior bargaining position, in languages and with legal concepts which were foreign to them and without adequate representation.[See Note 2 below.]

In this case, there was simply no such vulnerability. The Agreement is the product of a long and difficult process of negotiation. The benefits received and concessions made by the aboriginal parties were received and given freely, after serious thought, in a situation which was, to use their counsel's expression, one of "give and take". All of the details were explored by qualified legal counsel in a document which is, in English, 450 pages long. The scope of the negotiations was such that in section 25.5 of the Agreement Quebec undertook to pay to the James Bay Crees and the Inuit of Quebec, "as compensation in respect of the cost of negotiations", the sum of 3.5 million dollars. We have come a long way indeed from the "uneducated Savages" referred to by Norris J.A. in White and Bob, supra, note 2. The comments of Lamer J., who was not yet Chief Justice, in *Sioui* provide a good illustration of this evolution.

> The Indian people are today much better versed in the art of negotiation with public authorities than they were when the United States Supreme Court handed down its decision in Jones. ... (*Sioui, supra*, note 2 at p. 1036.)

Moreover, the recent pronouncements of the Supreme Court have already encouraged a certain realism and a respect for the intention and interests of *all* the signatories, even in relation to historic treaties:

Note 2. See *Mitchell* v. *Pequis Indian Band*, [1990] 2 S.C.R. 85 at p. 142; *R.* v. *Sioui*, [1990] 1 S.C.R. 1025 at pp. 1036 and 1072; *R.* v. *White and Bob* (1964), 50 D.L.R. (2d) 613 at p. 649 (B.C.C.A.).

> ... Even a generous interpretation of the document ... must be realistic and reflect the intention of both parties, not just that of the Hurons. The Court must choose from among the various possible interpretations of the common intention the one which best reconciles the Hurons' Interests and those of the conqueror. ... (*Sioui*, *supra*, note 2 at p. 1069.)
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> ... Defining the common intent of the parties on the question of territory in this way makes it possible to give full effect to the spirit of conciliation, while respecting the practical requirements of the British. ... (*Sioui*, *supra*, note 2 at p. 1071.)

Statutes relating to Indians

The aboriginal parties contend that the principle of construing ambiguities favourably also applies when statutes relating to Indians are to be interpreted, and that the Agreement, by virtue of being adopted by the Parliament of Canada, is a statute relating to Indians.

This rule, which is set out in Nowegijick, supra, in which the issue was the interpretation of section 87 of the *Indian Act*, seems to me to have been substantially diluted by the Supreme Court in Mitchell, supra, note 2, in which La Forest J. stated, at page 143:

> ...But as I view the matter, somewhat different considerations must apply in the case of statutes relating to Indians. Whereas a treaty is the product of bargaining between two contracting parties, statutes relating to Indians are an expression of the will of Parliament. Given this fact, I do not find it particularly helpful to engage in speculation as to how Indians may be taken to understand a given provision. Rather, I think the approach must be to read the *Act* concerned with a view to elucidating what it was that Parliament wished to effect in enacting the particular section in question. This approach is not a jettisoning of the liberal interpretive method.
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> ...At the same time, I do not accept that this salutary rule that statutory ambiguities must be resolved in favour of the Indians implies automatic acceptance of a given construction simply because it may be expected that the Indians would favour it over any competing interpretation. It is also necessary to reconcile any given interpretation with the policies the *Act* seeks to promote.

In any event, the issue in this case does not, strictly speaking, concern a "statute relating to Indians". While the Agreement has been confirmed by legislation, as this Court has concluded (see Cree Regional Authority, supra, note 1), which makes it an Act of the Parliament of Canada for the purpose of giving the Federal Court jurisdiction, nonetheless it is, fundamentally, "a legislated contract, one that derives all of its legal force *even as a contract* from the laws which are to give it effect and validity" (Cree Regional Authority, supra, note 1 at pp. 551-52). It would be an error to consider the Agreement to be such a statute, in order to import into it the principles of interpretation which apply to statutes relating to Indians. The federal *Act* here does not express "the will of Parliament"; rather, it expresses the will of the parties to the Agreement.

The fiduciary relationship

The aboriginal parties further contend that the principle of construing ambiguities in their favour derives from the fiduciary relationship which they contend exists between them and the Crown. Here again, we must be careful not to speak in absolute terms. When the Crown negotiates land agreements today with the Aboriginals, it need not and cannot have only their interests in mind. It must seek a compromise between that interest and the interest of the whole of society, which it also represents and of which the Aboriginals are part, in the land in question. This brings us back, in other words, to what the Supreme Court had to say in *Sioui*.

Even if we ascribe a fiduciary character to the relationship between the Crown and the Aboriginals, it requires good faith and reasonableness on both sides and presumes that each party respects the obligations that it assumes toward the other. On this point, I adopt the comments of Cooke J.A., of the New Zealand Court of Appeal, in *New Zealand Maori Council* v. *Attorney-General*, [1987] 1 N.Z.L.R. 641, at p. 664, with respect to a treaty dating from 1840:

> In this context the issue becomes what steps should be taken by the Crown, as a partner acting towards the Maori *partner with the utmost good faith which is the characteristic obligation of partnership*, to ensure that the powers in the *State-Owned Enterprises Act* are not used inconsistently with the principles of the Treaty. It was argued for the applicants that whether in any instance the transfer of a particular asset would be inconsistent with the principles of the Treaty is a question of fact. That is so, but *it does not follow that in each instance the question will admit of only one answer.* If the Crown acting reasonably and in good faith satisfies itself that known or foreseeable Maori claims do not require retention of certain land, no principle of the Treaty will prevent a transfer.
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> What has already been said amounts to acceptance of the submission for the applicants that the relationship between the Treaty partners creates responsibilities analogous to fiduciary duties. Counsel were also right, in my opinion, in saying that the duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable. There are passages in the Waitangi Tribunal's Te Atiawa, Manukau and Te Reo Maori reports which support that proposition and are undoubtedly well-founded. I take it as implicit in the proposition that, as usual, practicable means reasonably, practicable. It should be added, and again this appears to be consistent with the Tribunal's thinking, that *the duty to act reasonably and in the utmost good faith is not one-sided. For their part the Maori people have undertaken a duty of loyalty to the Queen, full acceptance of her Government through her responsible Ministers and reasonable co-operation.* (my emphasis)

Thus while the interpretation of agreements entered into with the Aboriginals in circumstances such as those which prevailed in 1975 must be generous, it must also be realistic, reflect a reasonable analysis of the intention and interests of all the parties who signed it and take into account the historical and legal context out of which it developed. To seek ambiguities at all costs - and there will always be room for this in documents of such magnitude - and to interpret any ambiguity systematically in favour of the aboriginal parties would be to invite those parties to use the vaguest possible terms in the hope that they might then apply to the courts and the certainty that, by so doing, they would gain more than the actual fruit of the negotiations. This sort of approach would distort the entire process of negotiating treaties, and the result would be that the courts, on the pretext of interpreting the terms of the compromise reached, would renegotiate that compromise for the benefit of the aboriginal parties and to the detriment of the governments which, it must be recalled, are accountable to the public as a whole and not only to the Aboriginals. In all fairness to all the contracting parties, how could a court, faced with such an important compromise as that set out in the Agreement, claiming to find ambiguity, put the "concessions" made by the Aboriginals back on the table without also putting the benefits they have obtained back on the table as well?

When it is modern treaties that are at stake, the aboriginal party must now, too, be bound by the informed commitment that it is now in a position to make. No serious and lasting political compromise or business agreement can be entered into in an atmosphere of distrust and uncertainty. Thus La Forest J. stated in Mitchell:

> ... I think it safe to say that businessmen place a great premium on certainty in their commercial dealings, and that, accordingly, the greatest possible incentive to do business with Indians would be the knowledge that business may be conducted with them on exactly the same basis as with any other person. Any special considerations, extraordinary protections or exemptions that Indians bring with them to the market-place introduce complications and would seem guaranteed to frighten off potential business partners. ... (Supra, note 2 at p. 147)

I also think it safe to say that it is in the interests of the Aboriginals themselves to interpret the agreements which they sign today in such a way that the other signing parties will not feel themselves at the mercy of constant attempts to renegotiate in the courts.

Question 1: Is the Eastmain 1 project part of Le Complexe La Grande (1975) such that it is not, by virtue of the provisions of section 8.1.2 of the Agreement, subject to the environmental regime established in Section 22 of the Agreement? (cross-appeal)

The motions judge concluded that the Project is part of the Complexe and that, by virtue of the provisions of section 8.1.2 [See Note 3 below], it is not subject to the Regime. This Court is not bound in all respects by this conclusion, which is of both fact and law, but I have no difficulty in adopting it.

Note 3. 8.1.2 Le Complexe La Grande (1975)

La Société d'énergie de la Baie James and Hydro-Québec may construct, operate and maintain Le Complexe La Grande (1975) substantially as described herein, in whole or in part, with or without LA 1 and EM 1, at their option. The components of Le Complexe La Grande (1975) which are constructed shall substantially conform to and be those components contemplated by the Description Technique - Le Complexe La Grande (1975) dated October 20, 1975 attached hereto as Schedule 1 of this Section of the Agreement. The parties to the Agreement acknowledge that Le Complexe La Grande (1975) is already under construction and therefore shall not be subject to the environmental regime established by the Agreement and further agree not to take any actions whatsoever which would prevent the construction of the said complex.

From all appearances, the parties to the Agreement intended that the Complexe, construction of which was under way and might go on until at least December 31, 1996 (section 25.1.13), would have a unique status and would not be subject to the Regime established by the Agreement. Clearly, their intention was to exempt both what was then built and what would be built over the years from that Regime, to the extent, as regards future construction, that it was substantially consistent with the description of it given in schedule 1 of Section 8. I acknowledge that this was a very long term commitment, but the aboriginal parties agreed to it with full knowledge of the facts, and agreed, in section 8.9.1, to the fact that some of the potential impacts of the Complexe "cannot be determined at this time" and "that remedial measures shall need to be studied, planned and executed during the construction and operation period" of the Complexe. They had themselves, in section 8.1.2, further agreed "not to take any actions whatsoever which would prevent the construction of the said complex". Moreover, in section 8.17, "in consideration of and subject to the benefits and undertakings" in their favour, they released Hydro-Québec "in respect to Le Complexe La Grande (1975) ... of all claims, damages, inconvenience and impacts of whatever nature ... that may be caused by the construction, maintenance and operation" of the Complexe. Their undertaking and long term release were in proportion to the favours granted to them, and they extended even to the maintenance and operation phases of the Complexe; this indicates the point to which the years did not matter to them.

The expressions used by the parties to the Agreement in Section 8 and schedule 1 of that section clearly indicate that the Project forms part of the Complexe. In fact, "EM 1" is mentioned in section 8.1.2, which is entitled "Le Complexe La Grande (1975)". The words "in whole or in part, with or without LA 1 and EM 1, at their option" are meaningless unless EM 1 is part of the Complexe. The "whole" or "part" includes EM 1, if Hydro-Québec so wishes and at whatever time Hydro-Québec may wish, because the components of the Complexe include those which "are constructed" both now and in future ["sont ou seront construits" in the French version of the Agreement], as well as those which "shall substantially conform" ["doivent ou devront" in the French version of the Agreement]. This definition is undeniably both present and prospective.

There is more. In the area of hydroelectricity, the Agreement provides two types of hydroelectric developments: "Le Complexe La Grande (1975)" in section 8.1.2, and "other projects" in section 8.1.3 [See Note 4 below], These "other projects" are "future" projects. Two of them are "known": the N.B.R. Complex and Great Whale Complex. If EM 1, a known project, had been intended to be considered a future project, it would have had to be put in section 8.1.3 rather than section 8.1.2.

Note 4 8.13 Other Projects

It is recognized that there exists a possibility of future hydroelectric developments in the Territory. Studies are being carried out in relation to the N.B.R. Complex dealing with the development of the Nottaway, Broadback and Rupert Rivers hereinafter referred to as the N.B.R. Complex and in relation to the Great Whale Complex for the development of the Great Whale, Little Whale and Coast Rivers hereinafter referred to as the Great Whale Complex. It is agreed that these known projects and any additions and/or substantial modifications to Le Complexe La Grande (1975), if built, shall be considered as future projects subject to the environmental regime only in respect to ecological impacts and that sociological factors or impacts shall not be grounds for the Crees and/or Inuit to oppose or prevent the said developments.

I further note that the expression "complex" in section 8.1.3 refers to hydroelectric powerplant development on several rivers and is not restricted to a single powerplant developed on a single river.

Section 8.18 [See Note 5 below] refers to the "project and its components, as *presently* described in Schedule 1" (my emphasis). What do we find in Schedule 1? *A title*, which reads as follows: "Le Complexe La Grande (1975), Technical Description, October 20, 1975". *A category*, entitled "Other Powerplants", which necessarily deals with other powerplants in the Complexe, and which specifies that EM 1 is one "of further hydroelectric development projects on the rivers and tributaries of the La Grande Complexe". *A plate*, plate No. 2, headed "Map and Profiles, Complexe La Grande", on which "Site EM-1" is drawn, with its dykes, and illustrating the [TRANSLATION] "longitudinal profile from LG-2 to EM-1 (Powerstation)" and its elevation (935 feet), and showing the [TRANSLATION] "contribution of the basins" of the Complexe, including the Eastmain basin (15,550 square miles). The aboriginal parties made much of note 1, found at the bottom of the Plate, which reads as follows: [TRANSLATION] "The EM-1 and LA-1 powerstations are not part of Le Complexe La Grande and are only at the preliminary study stage". This note does not have the significance attributed to it by the aboriginal parties. It simply means, in my opinion, that on October 20, 1975 (the date of the description), no final decision had yet been made with respect to the construction of these powerstations in the context of Le Complexe La Grande (1975). I would further point out that note 3, which relates specifically to the elevation of EM 1, reads as follows: [TRANSLATION] "value subject to modification according to the results of detailed studies", which confirms that detailed studies were then under way.

Note 5. 8.18 Application of Laws of Canada

Notwithstanding anything in this Section, the laws of Canada, from time to time in force, shall continue to apply to all development contemplated within the terms of this Section insofar as such laws are applicable to such development. Canada acknowledges that the project and its components, as presently described in Schedule 1, are in substantial conformity with the requirements of applicable federal laws and regulations and consents to its construction in accordance with said description in so far as such consent is required.

Section 25.1.13, which deals with the terms of payment of the compensation to be paid to the Aboriginals and the schedule of payments, contains the words "Le Complexe La Grande (1975) exclusive of Laforge-1 (LA-1) and Eastmain-1 (EM-1)". It seems to me that one only excludes something that would otherwise be included.

The aboriginal parties pointed to some variations between the French and English versions of the Agreement, but none of them appeared to me to be significant.

Finally, and to counter the arguments of the aboriginal parties to the effect that they could not in advance waive what they did not know - an argument which does not stand up in light of the passages examined above - Hydro-Québec introduced in evidence a map used in 1974 [TRANSLATION] "for the purposes of the discussions with the aboriginals" which bears the signature of an aboriginal representative. This map describes the "EM-1 powerstation" with its "spillway".

In short, the motions judge was correct in concluding that the EM-1 project was at that time considered to be an integral part of Le Complexe La Grande and that the technical description thereof was "as adequate and complete a technical description of the EM 1 Project as can be expected, considering that it was still under study". The Project, as part of the Complexe, is therefore not subject to the Regime established by the Agreement, subject, of course, to the answer to the following question.

Question 2: If the answer is yes, is the Project an "addition and/or substantial modification" to the Complexe such that it is, by virtue of the provisions of section 8.1.3 of the Agreement, considered to be a future project and therefore subject to that environmental regime? (cross-appeal)

However, the aboriginal parties submit, if the Project is part of the Complexe, it is an "addition and/or substantial modification" to the Complexe and, by the operation of section 8.1.3, it loses the exemption that it had earned under section 8.1.2.

The motions judge said that he disagreed with this argument. This time, we have a finding of fact, which could only be challenged in this Court if it were shown that it was patently unreasonable. The aboriginal parties have failed in this task. Hydro-Québec has clearly established that the essence of the Project announced in 1990 was the same as was contemplated in 1975. Meagre and terse though the 1975 description of the Project being studied may have been, nonetheless this essential information was known and described. The changes made during the study to a number of dykes, the maximum retention level of the reservoir and the maximum marling could not be considered to be a "substantial modification" within the meaning of section 8.1.3. By adopting the test of "substantial conformity", the parties intended to take a realistic position in respect of the actual long-term construction of the components of the Complexe. The

Complexe is to be constructed over a period of decades, and so it may also be adapted to new technologies, but still without the essence of the compromise reached in respect of it being altered.

The conclusion of the motions judge was based on the evidence. There is no ground for interfering.

Question 3: If the Project is subject to the Environmental Regime established by the Agreement, is the process placed under the responsibility of the federal Administrator inapplicable by virtue of the fact that it would be a project under provincial jurisdiction? (cross-appeal)

The Court finds itself here in an unusual position, to say the least. This case was heard in the first instance at the same time as a motion in which the aboriginal parties sought to have a writ of mandamus issued against the federal Administrator for the Great Whale project. The motions judge allowed the motion on September 10, 1991 (*Cree Regional Authority* v. *Canada*, [1992] 1 F.C. 440) (the Great Whale case) and his decision was appealed. In the reasons for the decision which he rendered in the present case on October 2, 1991, the motions judge incorporated some of the reasons for his decision in the Great Whale case, with the result that in some respects, while this Court is not seized with the judgment in that case, it is seized with part of the reasoning which led to it.

In order to succeed in their cross-appeal, the aboriginal parties found it necessary, inter alia, to argue again before us the same thing they had successfully argued in the Great Whale case. Conversely, in order to have the cross-appeal dismissed, Hydro-Québec and the Attorney General of Canada had to argue before us that the motions judge erred on September 10, 1991 in deciding that the federal Administrator was required to inquire into a project under provincial jurisdiction.

Since I conclude on another point that the Project is not subject to the Regime, I could dispense with answering this third question. However, in a case such as this where the outcome of one question depends on the answer given to the preceding question, it may be in the interest of the proper administration of justice to proceed as if that answer were wrong. The parties devoted considerable time and energy to debating this third question, which I could, strictly speaking, have decided to answer first. Accordingly, in the circumstances, I have decided to answer it.

At the outset, Section 22, in section 22.1.1 thereof, defines the word "Administrator":

> 22. 1.1 "Administrator" shall mean:
>
> (i) In the case of matters respecting provincial a jurisdiction, the Director of the Environmental Protection Service or his successor, or any person or persons authorized from time to time by the Lieutenant-Governor in Council to exercise functions described in this Section.

(ii) In the case of matters involving federal jurisdiction, any person or persons authorized from time to time by the Governor in Council to exercise functions described in this Section.

(iii) In the case of proposed development in Category I, the Cree Local Government Administrator responsible for the protection of the environment.

In order properly to understand the role of these Administrators, it will be useful to provide an outline of what happens when a proponent such as Hydro-Québec comes in with a project under provincial jurisdiction, in this case a hydroelectric development project which, under the terms of Schedule 1 itself, is automatically subject to the assessment procedure.

The assessment procedure established by the Agreement consists in three stages. In the first stage, the proponent submits to the Administrator (one or the other or both of them, or even the third ... this is the question) the preliminary information concerning its proposed development (22.5.11). The Administrator transmits this information to the Evaluating Committee (22.5.12), which recommends the extent of impact assessment and whether or not a preliminary and/or a final impact statement should be done (22.5.14). Armed with these recommendations, the Administrator alone decides whether to do an assessment and review (22.5.4, 22.5.14) and, where necessary, gives instructions or makes the appropriate recommendations to the proponent (22.5.4, 22.5.16). The proponent then prepares a statement of the environmental and social impacts ("impact statement"), "especially those on the Cree populations potentially affected" (22.6.8). This report must provide considerable detail as to the impact of the project on, inter alia, land and water vegetation and fauna, harvesting of wild life resources and social conditions, and must "equally consider their ecological relationships, their interaction, and when appropriate, their scarcity, sensitivity, productivity, variety, evolution, location, etc.".
Then the second stage begins. The proponent submits its impact statement to the Administrator, who transmits it forthwith "to the [provincial] Review Committee or the [federal] Review Panel" (22.6.10), which transmits (or transmit, this again being the question) it in turn to the Cree Regional Authority (22.6.11). The Authority may then "make representations to the Review Committee or the Review Panel" (22.6.12). "On the basis of the said impact statement and other information before it, the Review Committee or the Review Panel shall recommend whether or not the development should proceed and, if so, under what terms and conditions" (22.6.15). The decision of the Administrator is transmitted to the proponent (22.6.18), which is bound by that decision and shall give effect to it (22.6.19). If authorization is given, the proponent "shall before proceeding with the work obtained [sic] where applicable the necessary authorization or permits from responsible Government Departments and Services" (22.7.1).

There is still the third stage, which is a political one: "the Lieutenant-Governor in Council or Governor in Council may for cause authorize a development which has not been authorized pursuant to Sub-Section 22.6 or alter the terms and conditions established by the Administrator pursuant to Sub-Section 22.6" (22.7.2).

The issue before this Court is as follows. Relying on the decision rendered on this point in the Great Whale case, the aboriginal parties argue that once a project under provincial jurisdiction has an environmental impact in an area under federal jurisdiction, both the federal Administrator and the provincial Administrator have the power and duty to intervene and, ultimately, to block the project; that the proponent is required to submit the preliminary information concerning its proposed development and its impact statement to both the federal Administrator and the provincial Administrator; that both the federal Review Panel and the provincial Review Committee are seized of the case and that both the Governor in Council and the Lieutenant Governor in Council have the power to reverse the decision of the Administrator. The appellant, Hydro-Québec and the Attorney General of Canada contend, on the contrary, that the assessment procedure is not a parallel procedure, but is a single procedure, and that once the project falls under provincial jurisdiction (as opposed to under federal jurisdiction) it is the provincial side of the procedure which is set in motion, regardless of whether the project has an environmental impact in an area under federal jurisdiction, and that the federal Administrator, the federal Review Panel and the Governor in Council then have no active role to play.

Apart from the textual arguments which I shall discuss in greater detail later, the aboriginal parties' position immediately runs up against two obstacles which appear to me to be insurmountable. The first is that Section 22 covers any development project "which might affect the environment or people of the Territory" (22.1.4); by definition, therefore, any development project has implications in at least one area of federal jurisdiction, that is, Indians and lands reserved for the Indians *(Constitution Act*, 1867, s. 91(24)), and almost certainly in an area of shared jurisdiction, that is, the environment. Furthermore, it is self-evident that any development project in Quebec will have an impact on areas of provincial jurisdiction, such as natural resources (92A), public lands, timber and wood (92(5)), local works and undertakings (92(10)) and matters of a purely local or private nature in the province (92(16)). The parties to the Agreement did not take so much care in distinguishing between the respective roles of each government only to arrive at a solution which gives each of them equal decision-making power over every project, and automatically creates an overlap and a total impasse, the moment one government authorizes a project and the other does not. What can be said of a proponent who would, under section 22.6.19, be bound by two contradictory decisions and obliged to give effect to each of them, or who, under section 22.7.2, would have to choose between an order given to it by the Governor in Council and an opposing order given to it by the Lieutenant Governor in Council"?

The second obstacle, which is an extension of the first, derives from the text of the Agreement itself. Section 22.6.7 provides as follows:

> 22.6.7 The Federal Government, the Provincial Government and the Cree Regional Authority may by mutual agreement combine the two (2) impact review bodies provided for in this Section and in particular paragraphs 22.6.1 and 22.6.4 provided that such combination shall be without prejudice to the rights and guarantees in favour of the Crees established by and in accordance with this Section. Notwithstanding the above, a project shall not be submitted to more than one (1) impact assessment and review procedure unless such project falls within the jurisdiction of both Quebec and Canada or unless such project is located in part in the Territory and in part elsewhere where an impact review process is required.

The intention of the parties, which could not be clearer, is to avert any overlap. The rule is one review. The exception is two parallel reviews, but only where "the project", and not its consequences, falls within both jurisdictions (for example, a federal airport and provincial highway infrastructure), or where "the project" is partly outside the Agreement Territory. Even where parallel reviews are possible, the parties to the Agreement intended that it would be possible to "combine the two impact review bodies".[See Note 6 below] If we were to accept the position of the aboriginal parties we would be making the exception into the rule.

Note 6. This is how I understand the first paragraph of section 22.6.7, which is also careful not to permit the two Administrators to be "combined". The committee and the panel, which are not decision-making bodies, may be combined if necessary, to avoid conducting two investigations at once, but each Administrator retains his or her decision-making power, which is to be expected, since the project in question is hypothetically within both federal and provincial jurisdiction

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There is no lack of textual arguments. The actual mandate of the various bodies is significant. "*[M]atters* of" (my emphasis) exclusive provincial, exclusive federal or mixed or joint federal and provincial "jurisdiction are ... dealt with by" the Advisory Committee (22.3.4), and the right of the members appointed by Canada and the members appointed by Quebec to vote is simply taken away from them when the matter being dealt with is under exclusive provincial or federal jurisdiction, as the case may be.

"*[D]evelopment projects* of" (my emphasis) exclusive provincial, exclusive federal or mixed or joint federal and provincial jurisdiction "are ... dealt with" by the Evaluating Committee (22.5.7). Here again, the right of the members appointed by Canada and the members appointed by Quebec to vote is simply taken away from them when the matter being dealt with is under the exclusive jurisdiction of the other level of government.

The mandate of the provincial Review Committee, which is made up of members appointed by Quebec and by the Aboriginals and has no members appointed by Canada, is to deal with "*development projects* ... involving provincial jurisdiction" (my emphasis) (22.6.1). On the other hand, the mandate of the federal Review Panel, which is made up of members appointed by Canada and by the Aboriginals and has no members appointed by Quebec, is to deal with "*development projects* ... involving federal jurisdiction" (my emphasis) (22.6.4).

From all appearances, it is the nature of the matters in issue which determines the respective responsibilities of the federal and provincial members of the Advisory Committee, it is the nature of the development project which determines the respective responsibilities of the federal and provincial members of the Evaluating Committee and it is the nature of the development project which determines which of the provincial Review Committee and the federal Review Panel will deal with the project.

Throughout section 22.6, which describes the procedure for review by the provincial Review Committee and the federal Review Panel, and section 22.7.3, there are references to "the Review Committee *or* the Review Panel" (my emphasis) (22.6.10, 22.6.11, 22.6.12, 22.6.13, 22.6.14, 22.6.15, 22.6.17). Throughout Section 22, the word "Administrator" is used in the singular, which is understandable because it is defined in section 22.1.1 sometimes as one and sometimes as the other. Throughout the Section, whether the issue is "a project description" (22.5.1), "preliminary information" (22.5.11), "a preliminary and/or final report" (22.5.14, Schedule 3), or an "impact statement" (22.6.8, 22.6.10, 22.6.11, 22.6.13, 22.6.15, Schedule 3), the singular is used. In no case is it suggested that the proponent submit more than one report or that it submit the same report to each Administrator, or that it submit a separate report to each of them. Moreover, Schedule 3, which describes the "contents of an environmental and social impact statement", requires that the proponent state all the impacts, regardless, therefore, of whether they involve the jurisdiction of one government rather than of another.

The motions judge in Great Whale relied, at page 455, on subsection 33(2) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which provides that "words in the singular include the plural, and words in the plural include the singular". With respect, I do not believe that this *Act* applies to the Agreement, which is not an "enactment", that is, "an Act or regulation" within the meaning of subsections 3(1) and 2(1) of the *Act*. [See Note 7 below] As I explained earlier, the Agreement did have legislative effect, by virtue of being enacted by the *James Bay and Northern Quebec Native Claims Settlement Act,* supra, to the extent that the Federal Court may take jurisdiction, but it is nonetheless not an "Act" within the meaning of the *Interpretation Act*. In any event, the rule of singularity and plurality is a guide which is to be used only where the context so permits (see P.A. Côté, Interprétation des lois, 2nd ed., Montreal, Yvon Blais, 1990, at p. 75). In this case, the context does not allow a singular to be given plural meaning; it is neither conceivable nor realistic to read, each time we see the word "Administrator" in Section 22, the words "provincial Administrator", "federal Administrator" and "aboriginal Administrator".

Note 7: The result would be the same if we were to apply the Quebec *Interpretation Act*, R.S.Q., c. I-16, s. 54.

Moreover, Section 22 imposes specific time limits in the case of a "development being carried out by or on behalf of Federal Government departments or agencies" (22.5.16, 22.6.12, 22.6.14), and this indicates that the duties and powers of the federal Administrator, in 22.5.16 and 22.6.12, and of the federal Review Panel, in 22.6.14, are not on all fours with those of the provincial Administrator and those of the provincial Review Committee, and reinforces the theory that there are two reviews which are mutually exclusive.

In short, despite some insignificant minor differences between the English and French versions and some clumsiness in the use of certain words, including "jurisdiction", which is put to all-purpose service, the textual arguments also militate in favour of holding a single review of the Eastmain 1 project, which is under provincial jurisdiction, and of this review being conducted by the provincial Review Committee and the ultimate decision being made by the provincial Administrator or, if need be, by the Lieutenant Governor in Council of Quebec. When section 22.1.1 ii), which defines "federal Administrator", provides that "in the case of matters involving federal jurisdiction" that Administrator exercises "functions described in this Section", it is referring, somewhat clumsily, to the functions assigned to the Administrator in the Section which, by necessity, relate to either *matters involving federal jurisdiction* which are referred to the Advisory Committee or *projects under federal jurisdiction* which are referred to the Evaluating Committee and the federal Review Panel. The aboriginal parties are ill-advised to dispute today what they had themselves contributed to creating in 1975.

I therefore conclude that the federal Administrator does not exercise functions with respect to a development project such as the Eastmain 1 hydroelectric project, which is a project under provincial jurisdiction.

I would hasten to note that this conclusion does not prejudice the Aboriginals. They are a party to the procedure, whether it be federal or provincial, and may make their concerns known, where necessary, while participating in the complete study of the impact of a project, as members of the Evaluating Committee and the Review Committee or Review Panel. On this point I note that section 22.5.7 is careful to ensure that the Aboriginals have half of the votes on the Evaluating Committee, regardless of the nature of the project being considered, and that sections 22.5.8 and 22.5.9 provide that every two years the Aboriginals will have the deciding vote where the votes are equally divided.

Question 4: Could the Guidelines Order be applied to the Project? (appeal)

In answering this question in the affirmative, the motions judge merely referred to section 8.18 of the Agreement (supra, note 5) and deduced from it that "this section appears to permit the application of subsequently-enacted law, such as the ... Order, to all developments contemplated under section 8 of the JBNQ Agreement".

I do not share this opinion. It is still necessary, in fact, under the provisions of section 8.18 itself, that subsequent law be applicable to the development, and it is still necessary that such subsequent law meet the requirements of section 22.2.3, which reads as follows:

> ...All *applicable* federal and provincial laws of general application respecting environmental and social protection shall apply in the Territory *to the extent that they are not inconsistent with the provisions of the Agreement and in particular of this Section.* ... (my emphasis)

The Agreement makes detailed and exhaustive provision for the nature and extent of the environmental studies to which the parties agreed that development projects undertaken in Agreement territory would be subject. The Regime that was established represents the expression of the specific consensus reached by the parties, and the parties expressly intended that one Complexe, Le Complexe La Grande (1975), would be exempt from the application of this Regime, just as they intended, in section 2.5, that the provincial and federal legislation which was to give effect to the Agreement would both provide that where other legislation is inconsistent with the provisions of the Agreement the Agreement will prevail.

In the context of this consensus, the Government of Canada formally authorized the construction of the Complexe, in the second paragraph of section 8.18 of the Agreement, and gave legislative confirmation of this consent by adopting the *James Bay and Northern Quebec Native Claims Settlement Act*, supra. In my opinion, this is an irrevocable consent to the construction of the Complexe, with the result that the Order does not apply, since under the terms of section 3 of the Order itself it provides that the environmental assessment procedure shall take place "before irrevocable decisions are taken". Since the irrevocable decision was taken in 1975, the Order, which was adopted in 1984, cannot apply. The Order cannot apply retroactively to decisions validly made by the Government of Canada and confirmed by Parliament prior to its coming into force.

I conclude that the Order does not apply to the Project.

Question 5: If the answer is yes, have the conditions in which the Order is triggered been fulfilled in the case at bar with respect to one or all of the ministers? (appeal)

As I did in the case of question 3, I have decided to answer this question even though it is not strictly necessary to do so.

In *Friends of the Oldman River Society* v. *Canada (Department of Transport)*, [1992] 1 S.C.R. 3 (Oldman River), the Supreme Court, and in *Alcan Aluminium Limited et al.* v. *Carrier-Sekani Tribal Council*, A-560-91, May 8, 1992, unreported decision (Alcan), this Court examined in great detail the circumstances in which the Order is triggered, and I do not intend to go into this debate again. I take from these two decisions and from my analysis of the Order that the environment is not the prerogative of one level of government alone, and that it is not open to the federal government systematically to interfere in a project that falls within provincial jurisdiction on the pretext of environmental concerns. The Order is not routinely triggered; on the contrary, when it is, it results in the implementation of a complex administrative scheme which should not be used lightly. The review process is ancillary and preliminary to the making of a decision by an initiating minister. It should be instigated against a business or activity only where carrying out the project is subject to the proponent obtaining prior authorization from a federal minister who has the power and duty to give or refuse permission, or to impose conditions for carrying out the project. This power and duty must be based on a federal statute or on another affirmative federal duty.

The aboriginal parties submit that in this case the Minister of Indian Affairs and Northern Development, the Minister of the Environment, the Minister of Fisheries and Oceans and the Minister of Transport must give their consent before Hydro-Québec may carry out the Project. The motions judge found for the aboriginal parties, but his judgment was rendered before the two decisions referred to above, which laid down different guidelines from those which he followed. I would note that the evidence on which we are deciding this case is the very same as was before the motions judge, with the result that the aboriginal parties perhaps had not presented all the evidence at trial that they would have presented if they had known of the changes which would be made in this respect by the decisions in Oldman River and Alcan.

The Minister of Indian Affairs and Northern Development

While the federal government owes a fiduciary duty to the Aboriginals, one of the essential conditions for the Order to apply is missing: there is no federal law or other affirmative duty which imposes an obligation on the Minister of Indian Affairs and Northern Development to make a decision with respect to the carrying out of the Project. The mere possibility of environmental impact on matters relating to Indians and lands reserved for the Indians (subsection 91(24), *Constitution Act*, 1867) is not sufficient for the Order to apply.

This argument had been made before the Supreme Court in Oldman River. Because the Supreme Court did not deal with it, I assume that it did not accept it. In any event, I do not accept it. The interest of a minister, or even of a government, is not sufficient to trigger application of the Order.

The Minister of the Environment

Similarly, the general responsibilities of the Minister of the Environment for environmental issues cannot alone trigger application of the Order or make the Minister the "initiating minister" within the meaning of the Order. That Minister has no independent decision-making power over the carrying out of the Project. In fact, he would play no role in this case unless the Order applied. Thus La Forest J. noted in Oldman River, "[i]t cannot have been intended that the Guidelines Order would be invoked every time there is some potential environmental effect on a matter of federal jurisdiction" (p. 47).

The Minister of Fisheries and Oceans

The Supreme Court of Canada held in Oldman River that the *Fisheries Act*, R.S.C. 1985, c. F-14, did not operate to trigger application of the Order. It is true, as the aboriginal parties contend, that the Supreme Court seemed to be giving more consideration to subsection 35(1) than to subsection 35(2) of the *Act* when it concluded, at page 48, that there is no regulatory scheme under that *Act* which is applicable to the Project. However, we cannot assume that it did not also base its decision on subsection 35(2). I do not believe that it is then for this Court to decide that the Supreme Court did not decide what it appears to have decided.

In any event, even if there were an affirmative duty under subsection 35(2) to regulate, it is not certain that section 35 applies in this case, and even if it did apply, the aboriginal parties have not identified any fact which would trigger such an obligation.

In fact, on the one hand, it is not clear that section 35 applies to anything other than the *carrying on* ("exploitation" in the French) of "any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat".

We are here still at the stage of construction of the Project, and it seems to me to be premature to be speaking already about carrying on an undertaking. Counsel for Hydro-Québec has unearthed a pleiad of statutes which distinguish between the "construction" and "carrying on" of an undertaking. Since, by virtue of section 40, any contravention of section 35 is a criminal offence, section 35 must be narrowly construed, and the text of the *Act* itself provides some support for the distinction suggested by Hydro-Québec. [See Note 8 below]

Note 8: I have found no decision where, in applying section 35 to the "construction" of an undertaking, the distinction suggested by Hydro-Québec was brought to the attention of the court.

It could in fact be that in section 35 Parliament was solely interested in the "carrying on" of a work or undertaking. The word "construction" is found in sections 20, 21, 22, 29 and 30, and this may indicate that when Parliament referred to "carrying on" in section 35 it did not intend to include "construction". I further note that when Parliament wanted to deal with the period of construction or the period when construction is being planned, it did so expressly: see subsection 22(2), "during the period of construction thereof", and subsection 37(1), "[w]here a person carries on or proposes to carry on any work or undertaking". It therefore might be that section 37 deals with stages which section 35 does not cover.

Similarly, when an "obstruction" (which, by virtue of section 2, includes a "dam") impedes the free passage of fish, what Parliament has provided, in section 20, is not that the owner of the dams amend the plans or halt the construction thereof, but rather that it construct a "fish-way or canal" or, if it is not feasible to do so, that it reimburse the Minister such sums of money required "to construct, operate and maintain [a] complete fish hatchery establishment". I note the distinction which Parliament itself has made in subsection 20(2) among construction, operation ("exploitation", in the French) and maintenance.

Is it necessary to recall that the Agreement itself distinguishes almost systematically among "construct, operate and maintain" (see sections 8.1.2, 8.17, and so on)?

The suggested distinction between "operation" and "construction" is therefore not so surprising, upon reflection, as it might have appeared at first glance. However, I shall draw no firm conclusion from this, because the question was raised only at the hearing and the aboriginal parties did not really have an opportunity to make argument against the interpretation proposed by Hydro-Québec.

On the other hand, if the "construction" of the Project is covered by section 35, it appears that that section is intended to protect "fish habitat", which is defined in section 34 as "spawning grounds and nursery, rearing, food supply and migration areas on which fish depend directly or indirectly in order to carry out their life processes". It was not alleged in the proceedings that the construction of the Project threatens the spawning grounds and so on, on which fish depend to carry out their life processes. A party cannot simply make vague assertions concerning fish or fisheries and thereby trigger the so-called decision-making power of the Minister.

The Minister of Transport

In Oldman River, the Supreme Court of Canada found an affirmative duty to regulate in section 5 of the *Navigable Waters Protection Act*, R.S.C. 1985, c. N-22, which justifies the Minister of Transport in undertaking the initial assessment of a project which is subject to his approval.

However, in Oldman River, the parties had acknowledged that the Oldman River was in fact navigable (at page 54). The navigability of a river is an elementary condition for this *Act* to apply, and in the case at bar the appellant and Hydro-Québec vigorously dispute the navigability of the river.

The navigability of a river is a question of fact and of law. The Court cannot assume that it is navigable, and must be in a position to conclude from the evidence submitted that it is in fact navigable (*Bell* v. *Corporation of Quebec*, (1879-80) 5 A.C. 84 at p. 93; *Sim E. Bak* v. *Ang Yong Huat*, [1923] A.C. 429 at p. 433; *A.G. Quebec* v. *Fraser* (1906), 37 R.C.S. 577 at p. 596, confirmed sub nomine *Wyatt* v. *A.G. Quebec*, [1911] A.C. 489; G.V. La Forest and Associates, Water Law in Canada - The Atlantic provinces, Regional Economic Expansion, 1973 at p. 180; G. Lord, Le Droit québécois de l'eau, Centre de recherche en droit public, Université de Montréal, Éditeur officiel du Québec, 1977 at p. 61).

In this case, the aboriginal parties were content with vague statements in the sworn declarations which they entered into evidence, which statements were more in the nature of statements of principle and conclusions of law than of precise and useful narratives of fact on which the Court could base a finding. The Court knows nothing of the characteristics of the Eastmain River, either of its general course or of the area where the dam will be constructed. The fact that it is used as a border on geographic maps does not establish that it is navigable. The assertion that it has been used as a mode of transportation by Aboriginals is too general and too isolated for the Court to act on it.

The arguments of the aboriginal parties run up against Rule 412(2) of the Rules of this Court, which provides that "Raising a question of law or an express assertion of a conclusion of law - such as an assertion of title to property - shall not be accepted as a substitute for a statement of material facts on which the conclusion of law is based". (See *Bertram S. Miller* v. *R.*, [1986] 3 F.C. 291 (F.C.A.); *Caterpillar Tractor Co.* v. *Babcock Allatt Ltd.*, [1983] 1 F.C. 487.) To assert that the waters are navigable or that the dam will affect navigable waters is, it seems to me, to assert a legal consequence.

The aboriginal parties are so aware of the inadequacy of their evidence that they referred in their memorandum to a study which had not been placed in evidence and to facts set out in judgments rendered in other places, as if the Court could take notice of these facts and as if these facts could be set up against the other parties automatically. I understand that the aboriginal parties were caught short by the decisions in Oldman River and Alcan, but that does not do anything to make up for the problems in the case before us. We need only read the judgments which have decided whether watercourses were navigable to be persuaded that the Court would not have enough evidence in this case, even with the best intentions in the world, to be able to decide the issue one way or the other.

The so-called finding of fact made by the motions judge on the issue of navigability on which the aboriginal parties rely is found in the Great Whale case, and is therefore of no assistance to them in respect of the Eastmain 1 Project. In the case on appeal, the motions judge simply stated that "[t]he environmental consequences on navigable waters ... can hardly be disputed", without stopping to explain what these waters were and in what sense they were navigable. This is not a finding of fact which is binding on this Court and, as I noted at the outset, the question of navigability is, as well, a question of law.

I therefore conclude that the record as it stands does not allow the Court to conclude that the primary condition for the *Navigable Waters Protection Act*, supra, to apply, that is, the navigability of the Eastmain River, has been a established. The Minister of Transport could not exercise any decisionmaking power which would trigger the application of the Order before being persuaded of the navigability of the watercourse.

On the matter as a whole, I conclude that the conditions which trigger the Order have not been fulfilled in this case as against any of the mis-en-cause Ministers.

Before closing, I would like to refer to a piece of evidence which is in the record and which provides a proper perspective for viewing this case.

It appears that while Hydro-Québec believes that the Project is not subject to the Regime or to the environmental impact assessment and review process set out in sections 153 et seg. of Chapter II of the *Environment Quality Act*, R.S.Q., c. Q-2 (the *Quebec Act*), it nonetheless considers the Project to be subject to Quebec laws of general application, and more particularly to Division IV of Chapter I of the *Quebec Act*. In this respect, Hydro-Québec sent a letter to the Quebec Minister of the environment on June 11, 1990, informing him of the preliminary studies concerning the Project. On March 18, 1991 the Minister sent a Guide to Hydro-Québec indicating the nature, scope and extent of the environmental impact study, for the purpose of the preparation of the environmental impact study which Hydro-Québec must file in support of its application for a certificate of authorization under section 22 of the *Quebec Act* [See Note 9 below]. As of July 5, 1991, Hydro-Québec was in the process of finalizing the impact study which it prepared in accordance with the reference guide, the requirements of section 22 of the *Quebec Act* and the Regulation respecting the administration of the *Environment Quality Act*.

Note 9: Section 22 of the *Environment Quality Act* reads as follows:

> No one may erect or alter a structure, undertake to operate an industry, carry on an activity or use an industrial process or increase the production of any goods or services if it seems likely that this will result in an emission, deposit, issuance or discharge of contaminants

into the environment or a change in the quality of the environment, unless he first obtains from the Minister a certificate of authorization.*

* (On the interpretation of this section, see *P.G. Québec* v. *Société du parc industriel du centre du Québec*, [1979] C.A. 357.)

I would allow the three appeals and would dismiss the cross-appeal by the aboriginal parties, with costs at trial and on appeal to the Attorney General of Quebec and Hydro-Québec. The Attorney General of Canada would be entitled to her costs only in respect of the cross-appeal, since she did not seek costs in respect of her appeal.

DECARY J. LETOURNEAU J.:-- I concur.

MARCEAU J.:-- My Conclusions do not differ from those expressed by Décary J.A. in his reasons for judgment.

I also feel that the aboriginal parties' counter-appeal cannot succeed.

It seems clear to me on reading the James Bay and Northern Quebec Agreement that the parties to that agreement intended to make the said Eastmain 1 Project an integral part of the Complexe La Grande (1975), however little progress may have been made at the time on studies to implement this subsidiary hydroelectric project, and hence however little detail may have been available at that time on the technical description of it. As shown by the trial judge and accepted by my brother judge without reservation, reading clauses 8.1.2 and 8.1.3 of the Agreement together makes it clear that it could not have been otherwise; and moreover, the evidence as presented does not support the argument that what is to be built now is so different from what was planned and contemplated at the outset that the project actually constitutes an "addition and/or substantial modification" to the Complexe within the meaning of clause 8.1.3 of the Agreement. It is thus clear that, in view of the provisions of clause 8.1.2 of the Agreement, the Eastmain 1 Project is not covered by the environmental procedures contained in section 22. The trial judge was accordingly right to refuse to order the federal Administrator responsible in part for implementing the Agreement to perform any function derived from the provisions of section 22.

On the contrary, I feel like Décary J.A. that the appeals by the Attorneys General and Hydro-Québec are well-founded.

In my opinion, the trial judge could not order the respondent Ministers to apply to the Eastmain 1 Project the provisions of the Federal Environmental Assessment and Review Process Guidelines Order. My reason for this is simple. It is now accepted, since the Supreme Court's judgment in Oldman River, [See Note 10 below] as analysed by this Court in Alcan, [See Note 11 below] that the Order applies to any federal Minister required to assume some responsibility regarding a construction project which may have repercussions on areas under federal jurisdiction, responsibility which will exist if the Minister has any positive regulatory power over such project. It was recognized at the time of the Agreement, with the unqualified acquiescence of the federal government, that all governmental approval necessary for carrying out the Complexe La Grande (1975), and so including the Eastmain 1 Project, had been given (clause 8.18, paragraph 2, read together with clause 8.1.2, paragraph 3), with the result that no federal Minister can still be called on to exercise any responsibilities capable of triggering the Order. Moreover, as my brother judge says, even disregarding this previously confirmed approval, it has not been shown that any of the respondent Ministers could have any positive regulatory power affecting the Eastmain 1 Project. It is true that the intervention of the Minister of Fisheries might be required if it turns out that the survival of fish is endangered (s. 35 of the *Fisheries Act* [See Note 12 below]), and undoubtedly also that of the Minister of Transport if it were to be established that the Eastmain River must be regarded as navigable within the meaning of s. 91 of the *Constitution Act*, 1867 (s. 5 of the *Navigable Waters Protection Act* [See Note 13 below]); but the duty on either of these Ministers to act and act now is certainly not clear enough to be a basis for the issuance of the writ of mandamus sought.

Note 10: *Friends of the Oldman River Society* v. *Canada (Minister of Transport)*, [1992] 1 S.C.R. 3.

Note 11: *Alcan Aluminium Ltd. et al.* v. *Carrier-Sekani Tribal Council*, A-560-91, May 8, 1992, not reported.

Note 12: R.S.C. 1985, c. F-14.

Note 13: R.S.C. 1985, c. N-22.

I would therefore dispose of the appeals and counter-appeal as Décary J.A. suggests.

COUR SUPÉRIEURE DU QUÉBEC

[Répertorié: Canada (Procureur général) c. Vernon Homes Inc.]

Le Procureur général du Canada, pour le compte de Sa Majesté la Reine du Chef du Canada, ayant une place d'affaires au 200 ouest, René-Lévesque, Tour Est, 9e étage, Montréal, Demandeur c. Vernon Homes Inc. corporation légalement constituée ayant une place d'affaires au 3820 rue Melrose, à Montréal, Sorin Lupu, résidant et domicilié au 3820 rue Melrose, à Montréal, Filip Lupu, résidant et domicilié au 3820 rue Melrose, à Montréal, Corina Lupu, résidant et domiciliée au 3820 rue Melrose, à Montréal, Eliana Lupu, résidant et domiciliée au 3820 rue Melrose, à Montréal, Michel Colban, résidant et domicilié au 55 rue Courcelette, à Outremont, district de Montréal et Bélina Saraga, épouse de feu Emile Popper, résidant et domiciliée au 50, ave Grove, Larchmont, dans l'Etat de New York aux Etats-Unis d'Amérique, Défendeurs

Le Juge Lagacé

Montréal, Le 18 février, 1993

***Fisheries Act*, R.S.C. 1985, c. F-14, ss 34, 35, 36, 37 – order sought to stop adding of fill to land and to remove fill from land – issue whether land was part of flood plain and therefore fish habitat – evidence insufficient to prove land part of flood plain**

Summary: The defendants added fill to two residential lots of land under development. The purpose was to raise the elevation of the land to that of the adjacent road. Before approving the plans to increase the elevation of the land, the municipality checked with the Québec Ministry of the Environment. For more than 15 years, the Québec Ministry of Recreation, Hunting and Fishing had conducted a fish and wildlife habitat project covering one of the lots, lot 11. The lots were a few hundred meters from a small stream and were, according to the Attorney General within the stream's flood plain. All experts agreed that the flood plain played a helpful role in the ecosystem. The Ministry was well aware of the defendants' plans to develop the land.

The Attorney General for Canada sought an order under the *Fisheries Act* requiring the defendants to stop adding fill to and to remove fill from the two lots in question, lots 11 and 12. At the start of the trial, the Attorney General abandoned his claim in respect to lot 12.

The learned justice focused on the matter of whether lot 11 was in fact a part of the flood plain and therefore part of fish habitat. He concluded that the Attorney General's evidence on the contour lines in lot 11 was weak and did not prove that the flood water would reach the defentants' land. Accordingly, it could not be "fish habitat". The court, therefore, did not have to determine the questions regarding the frequency of flooding that would cause the land to be characterized as fish habitat.

Held: Action dismissed.

REASONS/MOTIF:

Jacques Savary et Sylvie Gadoury, pour le Demandeur
Harvey Crestohl, pour les Défendeurs
Robert Daigneault, pour le Défendeur, Sorin Lupu
Bertrand Bernier, pour le Défendeur, Michel Colban

[para1] LE JUGE LAGACE:-- La présente affaire soulève la question de la portée de l'article 35 de *la Loi concernant les pêches* [Voir Note 1 ci-dessous], face à une preuve qui délimite un territoire par une élévation géodésique choisie arbitrairement après une analyse statistique, et ce eu égard aux droits de justiciables de jouir librement de leur propriété, ainsi que de la compatibilité de la Loi concernant les pêches avec les lois provinciales et plus précisément la compétence provinciale exclusive en matière de zonage et droits de propriété.

Note 1: S.R.C., ch. F-14.

LES FAITS:

[para2] Le PROCUREUR GENERAL DU CANADA demande une ordonnance en vertu de *la Loi concernant les pêches* contre les co-défendeurs, pour faire cesser des travaux de rehaussement et enlever un remblai de terre sur les lots numéros 11 et 12 du cadastre de Boucherville.

[para3] VERNON HOMES INC. (VERNON) est propriétaire du lot numéro 12 situé dans la Municipalité de Boucherville, alors que DE BELINA SARAGA (Dame Popper) et MICHEL COLBAN sont propriétaires du lot voisin numéro 11. Les co-défendeurs FILIP LUPU, CORINA LUPU, et ELIANA LUPU sont poursuivis en leur qualité d'administrateurs de VERNON, tandis que SAURIN LUPU, lui aussi directeur de cette compagnie, représente et agit de plus pour BELINA SARAGA et MICHEL COLBAN, à titre de développeur du lot 11.

[para4] Le rehaussement des lots 11 et 12, objet du litige, a été entrepris à des fins de développement résidentiel de manière à niveler ces lots avec les rues adjacentes. Ces lots couvrent une superficie de près de soixante dix (70) arpents et les co- défendeurs prévoyaient y aménager quelque six (6) rues pouvant accueillir environ mille (1,000) unités de logement. Des rues et des maisons sont déjà construites sur une partie du lot numéro 12 et ce depuis 1986.

[para5] Le PROCUREUR GÉNÉRAL se plaint dans son action du rehaussement de terrain susdit qui aurait pour effet, selon lui, d'entraîner la "détérioration, la destruction, ou la perturbation de l'habitat du poisson" de la Rivière-aux-Pins qui coule à proximité des lots visés par la demande d'injonction. Le PROCUREUR GÉNÉRAL reproche de plus aux défendeurs d'effectuer un remblayage ayant pour effet "de rejeter une substance nocive - ou d'en permettre l'immersion ou le rejet - dans des eaux où vivent des poissons".

[para6] Les représentants du Département des pêches et du ministère du Loisir, de la Chasse et de la Pêche (M.L.C.P.) savent depuis plusieurs années que VERNON construit des maisons et appartements dans la Municipalité de Boucherville et plus précisément que les lots en litige doivent servir à un développement résidentiel.

[para7] La Municipalité a pris soin de vérifier auprès du ministère de l'Environnement du Québec avant d'autoriser VERNON à effectuer des travaux de rehaussement sur les lots en litige. Ces lots font partie d'un territoire zoné résidentiel unifamilial.

[para8] Le rehaussement actuel du terrain s'est échelonné de 1986 à 1988, dans la poursuite du développement déjà amorcé et approuvé. Toutefois une grande quantité de terre avait été placée par tas sur le lot 11, dès 1962; le nivellement de cette terre de remblayage de 1962 n'a été fait que depuis 1986. Le rehaussement postérieur à 1988 a été quant à lui effectué sur des terrains déjà rehaussés, mais enlevé en 1990. Notons que tout le rehaussement des lots 11 et 12 s'est effectué entièrement sur la terre ferme, en terrain plat, et à sec, et que ces lots sont situés à quelques centaines de mètres d'un petit cours d'eau connu sous le nom de la Rivière-aux-Pins.

[para9] Or il arrive de façon régulière que cette rivière sorte de son lit au printemps et que l'eau couvre alors une partie des terres basses qui la bordent. C'est ainsi que le PROCUREUR GÉNÉRAL DU CANADA peut aujourd'hui soutenir que la situation géographique des lots 11 et 12 fait en sorte qu'ils s'intègrent naturellement et pour partie à la plaine inondable de la Rivière-aux-Pins. Avec la conséquence qu'à l'occasion des crues printanières de la rivière, une partie des lots 11 et 12 se trouverait, selon le PROCUREUR GÉNÉRAL, submergée par les eaux pendant une période variant de plusieurs jours à plusieurs semaines, suivant l'importance de la crue.

[para10] Pour leur part, les défendeurs ont toujours soutenu que les lots 11 et 12 ne sont pas touchés par les inondations printanières causées par la crue des eaux de la Rivière-aux- Pins. C'est d'ailleurs ici que le débat devient le plus chaudement disputé.

[para11] Ajoutons que le M.L.C.P. s'intéresse depuis plus de quinze (15) ans à la Rivière-aux-Pins, et ce dans le cadre d'un projet d'aménagement d'habitat du poisson et de la faune. L'assiette de ce projet d'aménagement couvre d'ailleurs le lot numéro 11. Tant le M.L.C.P. que le ministère des Pêches et Océans connaissent les projets et travaux des co-défendeurs sur les lots 11 et 12. Le M.L.C.P. a même exploité de 1976 à 1978 un barrage expérimental à l'embouchure de la Rivière-aux-Pins, pour y maintenir artificiellement un habitat du poisson. Ce barrage a d'ailleurs provoqué une inondation prolongée du lot 11, et a été exploité à nouveau de 1986 à 1988, alors que le projet de rehaussement artificiel du niveau des eaux de la rivière a été abandonné à cause de son effet négatif sur d'autres espèces.

[para12] Si tous les experts entendus s'entendent sur le fait que la plaine inondable de la Rivière-aux-Pins joue un rôle utile dans l'écosystème, considérant le type de végétation qui y croit et les nombreux micro-organismes qui s'y développent, leurs opinions divergent toutefois totalement lorsqu'il s'agit de savoir si ces plaines inondables constituent ou pas un "habitat du poisson".

[para13] Pour les biologistes qui supportent la thèse de la demande, ces plaines inondables constituent un "habitat du poisson" et ces plaines jouent un rôle important dans le cycle alimentaire

et reproductif de certaines espèces, dont le grand brochet. Pour les bioogistes de la défense, sans nier le rôle des plaines inondables dans le cycle alimentaire et dans l'ensemble de l'écosystème, la partie des plaines en litige qui appartient aux défendeurs ne constitue pas un "habitat du poisson".

LES PRETENTIONS DES PARTIES:

[para14] Le PROCUREUR GÉNÉRAL allègue que la plaine inondable de la Rivière-aux-Pins constitue un "habitat du poisson" au sens de l'article 34.1 de *la Loi concernant les pêches*, principalement à cause de son rôle dans le cycle alimentaire et reproductif du poisson. Il prétend de plus que les lots 11 et 12 font partie de ces plaines inondables et que, par voie de conséquence, leur rehaussement a pour effet de détruire l'habitat du poisson au sens de l'article 35.1 de la même Loi. Il ajoute de plus que les co-défendeurs étaient requis de remettre au Ministère des pêches et océans les plans et devis du projet domiciliaire, ce qu'ils n'ont jamais fait. Il avance enfin que les matériaux ayant servi au rehaussement contiennent des substances nocives qui "risquent d'affecter l'habitat du poisson" de la Rivière- aux-Pins; alors que la preuve révèle que les matériaux de construction sont constitués de matières naturelles, que la végétation y croit facilement, et que rien n'indique que les matériaux utilisés contaminent ou risquent de contaminer la Rivière-aux-Pins.

[para15] Les défendeurs pour leur part soutiennent que le lot 11, et de surcroît le lot 12, sont plus élevés que le niveau des crues annuelles de la Rivière-aux-Pins.

LE LOT 12:

[para16] En début d'audition, le PROCUREUR GÉNÉRAL a déclaré abandonner ses prétentions quant au lot 12 et conséquemment a déclaré se désister de son recours quant aux défendeurs propriétaires de ce lot. Les parties ne se sont toutefois pas entendues sur les frais auxquels donne droit ce désistement. Aussi les parties demandent-elles à la Cour de trancher cette question, et plus précisément celle relative aux frais d'expertise encourus par les défendeurs pour rencontrer les prétentions de la demande quant aux soi-disant illégalités des travaux exécutés sur le lot 12. De sorte que le débat devant la Cour ne porte plus que sur le lot 11 et les frais résultant du désistement relatif aux procédures contre les propriétaires du lot 12.

LE DROIT:

[para17] LE PROCUREUR GÉNÉRAL DU CANADA appuie son recours principalement sur les articles 35(1) et 36(3) de *la Loi concernant les pêches.*

[para18] L'article 35(1) se lit comme suit:

> "Il est interdit d'exploiter des ouvrages ou entreprises entraînant la détérioration, la destruction ou la perturbation de l'habitat du poisson."

[para19] Et doit se lire avec la définition d'"habitat du poisson" de l'article 34(1):

> Frayères, aires d'alevinage, de croissance et d'alimentation et route migratoire dont dépend, directement ou indirectement, la survie des poissons."

[para20] L'article 36(3) avise que:

> "Sous réserve du paragraphe (4), il est interdit d'immerger ou de rejeter une substance nocive - ou d'en permettre l'immersion ou le rejet - dans des eaux où vivent des poissons, ou en quelqu'autres lieux si le risque existe que la substance ou toute substance nocive provenant de son immersion ou rejet pénètre dans ces eaux."

[para21] Et doit se lire avec la définition de "substance nocive" de l'article 34(1)a):

> "Toute substance qui, si elle était ajoutée, altérerait ou contribuerait à altérer la qualité de celle-ci au point de la rendre nocive, ou susceptible de le devenir, pour le poisson ou son habitat, ou encore de rendre nocive l'utilisation par l'homme du poisson qui y vit;"

[para22] L'article 37 de *la Loi sur les pêches* également invoqué par la demande se lit comme suit:

> "37(1) Les personnes qui exploitent ou se proposent d'exploiter des ouvrages ou entreprises de nature à entraîner soit l'immersion de substances nocives dans des eaux où vivent des poissons, ou leur rejet en quelque autre lieu si le risque existe que la substance nocive en cause, ou toute autre substance nocive provenant de son rejet, pénètre dans ces eaux, soit la détérioration, la perturbation ou la destruction de l'habitat du poisson, doivent, à la demande du ministre - ou de leur propre initiative - dans les cas et de la manière prévus par les règlements d'application pris aux termes de l'alinéa (3)a), - lui fournir les documents - plans, devis, études, pièces, annexes, programmes, analyses, échantillons - et autres renseignements pertinents, concernant l'ouvrage ou l'entreprise, ainsi que les eaux, lieux ou habitat du poisson menacés, qui lui permettront, de déterminer, selon le cas:
>
>> a) si l'ouvrage ou l'entreprise est de nature à faire détériorer, perturber ou détruire l'habitat du poisson en contravention avec le paragraphe 35(1) et quelles sont les mesures éventuelles à prendre pour prévenir ou limiter les dommages;
>>
>> b) si l'ouvrage ou l'entreprise est ou non susceptible d'entraîner l'immersion ou le rejet d'une substance en contravention avec l'article 36 et quelles sont les mesures éventuelles à prendre pour prévenir ou limiter les dommages."

[para23] Partant de ces textes de Loi, il incombe au PROCUREUR GÉNÉRAL de prouver que le site visé par sa procédure constitue une "frayère" ou une "aire d'alimentation" au moment et à l'endroit où les travaux de rehaussement ont été exécutés, et que les défendeurs ont "exploité" un "ouvrage ou une entreprise" ayant eu les effets mentionnés à l'article 35 de *la Loi sur les pêches*, c'est-à-dire "la destruction ou la perturbation de l'habitat du poisson".

[para24] Il incombe de plus au PROCUREUR GÉNÉRAL de prouver que les matériaux utilisés pour le rehaussement contiennent des "substances nocives" au sens de l'article 34(1) de *la Loi sur les pêches* et qu'il y a risque que de telles substances pénètrent dans une eau où vivent des poissons, en l'occurrence la Rivière-aux-Pins.

[para25] Le demandeur s'en remet à des avis d'experts pour déterminer s'il y a "habitat du poisson", alors que le Législateur prévoit sa propre définition d'un habitat du poisson, et qu'il appartient à la Cour de l'interpréter.

[para26] Dans sa recherche des éléments prouvés de la définition, de "l'habitat du poisson", la Cour doit tenir compte du contexte général d'application de la Loi, l'article 35(1) étant destiné à ne prohiber que les travaux ou entreprises qui sont en contravention réelle ou en conflit avec la protection et la préservation de l'habitat du poisson, à titre de ressource. Dans ce contexte, l'article 37 précité de la Loi n'a manifestement pas d'application en l'espèce.

[para27] Indépendamment de l'interprétation qu'il faut donner au texte de la Loi qui s'applique au litige, encore faut-il pour le PROCUREUR GÉNÉRAL d'abord établir que la partie du lot 11 visé par sa demande se situe à l'intérieur de la cote de récurrence des niveaux d'eau mis en preuve et justifiant la Cour de protéger ces lieux à titre d'"habitat du poisson. En d'autres termes, s'il n'est pas établi que la crue des eaux atteint la partie du lot 11 visé par la procédure, comment conclure que les travaux de remblaiement sur le lot 11 ont pour effet d'entraîner la détérioration, la destruction ou la perturbation de l'"habitat du poisson" ? Comment peut-il y avoir un "habitat du poisson" sans eau", et par voie de conséquence, sans "frayère, aire d'alevinage, de croissance et d'alimentation et route migratoire dont dépend, directement ou indirectement, la survie des poissons" ?

[para28] La demande et la défense ont tellement compris l'importance de la question des courbes de niveau du sol, que c'est ici que le débat devient plus complexe et controversé au point d'accaparer une très grande partie du temps d'audition. Les experts en général s'entendent sur les niveaux d'eau observés aux stations de Pointe-aux-Trembles et Varennes et transposables à la Rivière-aux-Pins. Leurs conclusions à se sujet diffèrent quant aux cotes de récurrence au-delà de dix (10) ans; mais pour la cote de récurrence de cinq (5) ans, soit celle visée par la demande, les conclusions des experts, aussi bien en demande qu'en défense, à toutes fins pratiques concordent.

[para29] Les experts se séparent toutefois au niveau de la cartographie utilisée par le PROCUREUR GÉNÉRAL pour établir qu'une partie du lot 11 serait comprise, pour une superficie d'environ dix-neuf (19) arpents, dans la zone de niveau de la cote de récurrence de cinq (5) ans et relative à la crue des eaux. La cartographie réalisée par photogrammétrie implique un procédé technique fort complexe qui se traduit finalement dans un résultat marqué d'une certaine marge d'erreur que ne manque pas de relever la défense.

[para30] La Cour et même les experts de la défense ne s'attaquent pas à la compétence de madame Bruger qui a réalisé cette cartographie pour le compte du PROCUREUR GÉNÉRAL. Toutefois ils lui reprochent de ne pas avoir vérifié le résultat sur le terrain, contrairement à ce qu'ont fait certains experts de la défense et contrairement aux normes reconnues. Ces experts doutent entre autres de l'exactitude d'un pointé exécuté entre les nombreux tas de terre qui se trouvaient à l'époque sur les lieux.

[para31] Si la demande n'a pas à prouver l'exactitude des niveaux établis par l'experte Bruger au-delà de la balance des probabilités, encore lui faut-il établir que tout a été fait par madame Bruger, ou son équipe qui n'a d'ailleurs pas témoigné, pour vérifier sur le terrain l'exactitude du travail relatif à la cartographie des niveaux.

[para32] Or la végétation de l'endroit, la présence de nombreux tas de terre là où se sont faits les pointés, le tracé du biologiste Massé entendu pour le compte de la demande quant au niveau des eaux et le témoignage des experts entendus pour le compte de la défense quant à leurs propres conclusions à partir des photographies sur les courbes de niveau, voilà autant d'éléments réunis qui empêchent la Cour de conclure comme le souhaite la demande sur l'exactitude des courbes de niveau et les conclusions qu'il faut en tirer. Ces faiblesses dans la preuve de la poursuite empêchent la Cour de conclure que le territoire en litige est compris dans une zone d'"habitat du poisson", puisque la preuve n'est pas faite que l'eau atteint en période de crue, à la cote de récurrence visée, les lots des défendeurs.

[para33] Partant de là la Cour n'a pas à répondre aux autres questions, entre autres à celle de savoir si une plaine à savoir si une plaine inondable peut devenir un habitat à tout les cinq (5) ans, à tous les trois (3) ans ou à tous les deux (2) ans selon la cote de récurrence retenue du niveau des eaux, ou encore si c'est la fréquence des inondations qui doit déterminer s'il s'agit d'un "habitat du poisson" ou pas ? Si une inondation suffit à faire d'un territoire un habitat de poissons? Si les lots en litige constituent en période de crue une "frayère, aire d'alevinage, de croissance et d'alimentation et route migratoire dont dépend, directement ou indirectement, la survie des poissons" ?

[para34] De plus, la demande n'a pas plus prouvé que le rehaussement du lot 11 entraînait "la détérioration, la destruction, la perturbation de l'"habitat du poisson".

[para35] La Cour ne cache pas que sa période de réflexion après l'audition, la visite des lieux et l'argumentation, résulte principalement du fait qu'une grande partie des autorités citées par la demande s'appuie sur la Loi de la qualité de l'environnement et que le litige a pris la couleur d'une cause environnementale. La Cour ne doute pas que le territoire ! visé par la procédure joue un rôle important dans l'écosystème et la qualité de l'environnement et mériterait une protection par une réglementation adéquate adoptée en vertu de *la Loi sur la qualité de l'environnement* de façon à en faire une zone protégée pour l'environnement, la faune et d'autres espèces que le poisson et le grand brochet. N'importe quel citoyen le moindrement intéressé à la nature et l'environnement et qui a vu les lieux qu'a visité la Cour, réfléchirait sérieusement aux questions posées avant d'abandonner un tel territoire au soi- disant progrès de la civilisation. Un tel projet a d'ailleurs déjà été étudié pendant plusieurs années par le M L C P avec l'objectif de faire de ce territoire une zone d'observation et de protection de la faune. Malheureusement le projet n'a pas eu de suite faute d'argent et peut-être faute de volonté politique ? A toutes fins pratiques la Cour ignore pourquoi ce projet n'a pas fonctionné, puisque le litige se situe à un autre niveau et que le PROCUREUR GÉNÉRAL DU CANADA a préféré tester *la Loi concernant les pêches* et que les Autorités provinciales ne sont pas en cause et ne sont pas intervenues pour défendre l'environnement.

[para36] *La Loi concernant les pêches* ne saurait servir une fin pour laquelle elle n'a pas été conçue. La Cour, malgré sa sympathie pour la cause, somme tout environnementale défendue avec une profonde conviction par le biologiste Massé et les avocats du PROCUREUR GÉNÉRAL, ne saurait se prêter à une expropriation déguisée qui aurait pour effet de priver les propriétaires du lot 11 de la jouissance complète de leur territoire, à défaut d'infraction à *la Loi concernant les pêches*. Au contraire la Cour se doit d'opter pour une solution qui constitue une application de la Loi

concernant les pêches qui soit constitutionnellement autorisée et qui respecte le droit des co-défendeurs.

[para37] Le droit des défendeurs à la mise en valeur de leurs propriétés est clair. La Cour n'est pas saisie d'un litige environnemental; et d'ailleurs il n'existe aucune réglementation adoptée sous *la Loi de l'environnement* pour restreindre le droit des défendeurs. Par ailleurs le PROCUREUR GÉNÉRAL a failli avec la première prémisse de ses prétentions, à savoir prouver à la satisfaction de la Cour que le lot 11 se situe à l'intérieur de la zone de récurrence qu'il souhaitait faire imposer par la Cour pour que ce territoire puisse se qualifier dans la définition d'un "habitat de poissons" au sens de *la Loi concernant les pêches.*

[para38] CONSÉQUEMMENT il y a donc lieu pour la Cour de rejeter la demande du PROCUREUR GÉNÉRAL.

[para39] Quant aux frais des défendeurs propriétaires du lot 12 sur lequel le PROCUREUR GÉNÉRAL a abandonné ses prétentions en se désistant de sa demande en début d'audition, la Cour ne voit pas pourquoi la règle habituelle ne serait pas appliquée à savoir "que celui qui se désiste paie les frais de l'autre partie".

[para40] Et puisque jusqu'au jour de l'audition le litige portait tant sur le lot 12 que sur le lot 11 et que les frais d'expertises engagés par la défense couvraient les deux lots, il n'est que juste que le PROCUREUR GÉNÉRAL qui décide de se désister, le jour de l'audition, de ses prétentions quant au lot 12, supporte la moitié des frais d'expertises encourus jusqu'à la date d'audition.

[para41] POUR CES MOTIFS:

[para42] REJETTE l'action avec dépens y compris quant aux défendeurs FILIP LUPU, CORINA LUPU, ÉLIANA LUPU ET SORIN LUPU, la moitié des frais d'expertises encourus jusqu'à la date d'audition et tous les frais d'expertise encourus par suite de l'audition;

[para43] DÉCLARE que le désistement produit avant l'audition quant aux défendeurs VERNON HOMES INC., BÉLINA SARAGA (Madame TOPPER) et MICHEL COLBAN entraîne l'obligation pour le PROCUREUR GÉNÉRAL DU CANADA de payer les frais judiciaires encourus jusqu'à la date d'audition, à l'exclusion des frais d'audition, mais incluant la moitié des frais d'expertises encourus jusque là.

NORTHWEST TERRITORIES TERRITORIAL COURT

[Indexed as: R. v. Echo Bay Mines Ltd.]

IN THE MATTER OF Her Majesty The Queen and Echo Bay Mines Ltd.

Davis J.

Yellowknife, May 10, 1993

***Fisheries Act*, R.S.C. 1985, c. F-14, s. 36(3) – accused company charged under s. 36(3) – deposited 3,000,000 gallons of liquid mine effluent in waters frequented by fish – guilty plea**

Sentencing -- $50,000 fine – considerations were nature of the environment, size of the company, criminality of the company, the company's efforts to comply with the law, the company's remorse and its record of violation – also considered amounts paid by company after the incident – fines should increase in proportion to increase in maximum fines in the Act

Summary: The accused corporation was charged with contravening s. 36(3) of the *Fisheries Act* by depositing a deleterious substance, namely liquid metal mine effluent into waters frequented by fish. The company pleaded guilty to the charge. This is a hearing on sentencing based on an agreed statement of facts.

The first indication of a problem came when an employee of the mine noticed some runoff in the area of a confinement wall. Because it was not clear whether it was seepage from the tailings containment area or spring runoff, samples were taken for testing. Within 2 days, while the tests were being done, government authorities were notified. During that same period of time, 3,000,000 gallons of liquid effluent was released into a water system consisting of 2 lakes and a number of rivers or creeks. The company acknowledged that fish existed in the water system. Once it was determined that effluent was leaking, the drainage pipe from the mine site was put into a different confinement unit, so that the company could reconstruct and reinforce the dam.

In considering sentence, the court took into account the following factors: the damage to fish was limited although long term damage was unknown; the company was financially stable and a major NWT company; there was no criminal intent; the company had made an effort to comply with the law; the company's remorse was evident through the presence of senior corporate officers in court; the company would not receive profits as a result of the offence; and the company had no previous record of violation.

The court determined that, given the six fold increases in fines in the *Fisheries Act*, the court should properly increase penalties by a proportionate amount from penalties in previous cases. Taking into account that the company had spent $60-70,000 since the offence to improve the situation, seepage of a large amount would have resulted in a fine of $10-15,000 using the previous maximum. The learned judge increased the fine in proportion to the new maximum in the Act.

Held: Fine of $50,000

REASONS/MOTIF:

G. Webber, Counsel for the Crown
G. Malakoe, Counsel for the Defence

REASONS FOR SENTENCE

[para1] DAVIS J.:-- Echo Bay Mines, an international company that operates a profitable mine called Lupin Mines 56 miles from the Arctic Circle in the Northwest Territories has entered a plea of guilty to a charge that it did between the 30th of May, 1992, and the 5th day of June, 1992, deposit deleterious substances, namely liquid metal mine effluent into waters frequented by fish, that being a violation of Section 36(3) of the *Fisheries Act*.

[para2] The submissions before me indicate that there are a number of matters that should be considered in sentencing of the company today based on an agreed statement of facts that have been filed with the court and read into the record by the Crown prosecutor.

[para3] The only change in the facts that I note is that the height of the dam was shown as 485 meters, whereas the height of the water showed at 484.4 meters, and that actually was meaning for the purposes of determining the height of the dam in relation to the water that was contained by it to be reference to the elevations of those two spots, and in fact that the depth of the solution and most of the water being held back within the containment area was somewhere between 10 and 15 feet in depth.

[para4] It is acknowledged that one of the mine representatives had on May the 30th noted a run-off in the area of part of the confinement wall referred to as Dam 4-B, and it was not apparent at the time whether that run-off was seepage from the tailings containment area or whether it was just the ordinary spring run-off.

[para5] I think the management of the company showed proper concern because the material that was then running off had been taken as samples for testing. Testing was done. The first test, being a scientific investigation, was not done accurately, and it was necessary to have a second test done. The second test indicated that it would have been some run-off materials that were seeping from the dam. Within what appears to be two days, and during which time I presume the tests were being done, the company reported the spill or the seepage to government authorities, and on the morning of June 1, 1992, there was a program in place to try and re-establish the benefit of the value and the capacity of the seeping dam to retain the material.

[para6] During that period of time, a substantial amount of effluent, that's 3,000,000 gallons approximately, and that's an estimate of course, was released into a water system. It is recognized by the company that fish existed in the water system including two lakes and a number of either rivers or creeks.

[para7] Immediately upon it being learned that the effluent was leaking, the drainage pipe from the mine site was put into a different confinement unit, and for almost a month, the effluent that had been pumped into the large confinement area classified on some of these schedules and maps here as Cell 3 was then pumped into another confinement area in which there was no seepage so that the company could reconstruct and reinforce the dam that was then ineffective, or at least partially ineffective.

[para8] I state these findings from the facts because the actions taken by the company in its expenditure of a number of thousands of dollars in repairing the dam that was not operating effectively shows that the company was taking the proper steps and confirms the facts that are agreed to by counsel that Echo Bay Mines was cooperative throughout the investigation, and had a good history of compliance with the government regulatory agencies since it began its operation in 1982.

[para9] The factors that a court must take into account in determining a sentence to be imposed on a company that fails to stand up to the required standard under the law have been listed very effectively and conveniently by Judge Barry Stewart of the Territorial Court of the Yukon in a case reported in 1980 as *The Queen* v. *United Keno Mines*, reported in 1980, 10 C.E.S.R. at page 43.

[para10] The court must recognize such things as the nature of the environment, and in the north it is recognized that the environment is fragile. All companies operating in the north must take special precautions to ensure that the environment is not damaged. In this instance the extent of the injury appears to me to be limited in that within a couple of months, fish were living in the lake in which the effluent had been seeping, and it appears from the documentation provided that the cyanide or poisonous materials were at such a level that they would not kill fish.

[para11] The Crown has properly pointed out, however, that we do not know the extent of long term effects on the lakes or the environment from the deposit of some of the metal products that were in the effluent, and, of course, with regard to the injury, the courts have been directed by other cases that have been reported that we should always consider approaching the question of sentences not on what the damage in fact was, especially if it is minor, but on the potential for damage because the imposition of penalties is to ensure that the persons know that they must comply with the requirements of the law to avoid any potential harm.

[para12] The size of the offending body also has to be taken into account because the company that has earnings of a $20,000 profit a year can't pay a hundred thousand dollar fine, no matter what the court might impose. It would be rather silly to consider such an imposition of a fine unless the court was intending to close the company up.

[para13] I do, however, have to recognize that the company before me is of a financially stable basis and is in a position and is classified as a major company in the Northwest Territories in its operation and one that is sound and of a relatively large size.

[para14] The criminality of the company ordinarily would be determined by its attitude and whether or not there has been a disregard for the law. I do not find that it has been shown to me in any way from the facts presented or submissions made that this company had an intent to act in a criminal way or quasi criminal way.

[para15] The company's efforts at complying with the law also is taken into account, and the company should not be harshly punished if evidence indicates that there have been diligent attempts to comply with the government regulations. It is obvious from what has been said that the company made efforts to comply with the requirements of the law in that it had planned on replacing the dam that happened to seep earlier than the company had expected, and the company also had expended a substantial amount of money in taking care of the problem once it had occurred.

[para16] The company has shown remorse in that senior officers of the company are present in court, the local manager and the person responsible for the environmental effects at the Lupin Mine, and the Safety Environmental Vice President of the company from the United States head office. That's showing the public in the Northwest Territories that the company is concerned about ensuring that it operates within the law, and to the benefit of both the company and the Northwest Territories.

[para17] The company also voluntarily reported the spill at what I classify as a very early date, even though there was substantial effluent that had passed beyond the dam during that two day period. The company certainly was not in a position where it would realize any additional profits by acting in a way that involves an offence. In this instance, I cannot find that the company was intending to benefit in any way by failing to take the necessary precautions to install additional strength in that dam before the leak occurred.

[para18] The company's record of violations can be taken into account, and there is nothing before me to indicate that Echo Bay Mines has been anything other than a good corporate citizen.

[para19] Now, it is acknowledged by the company and its solicitor that the company could have done more than it did, and failure to act quickly enough or to have acted in advance of the failure of the dam has resulted in charges before the court. There is, however, before me an indication that the corporation diligently tries to be a good corporate citizen in that it has been working here for over 10 years, and there was nothing before me to indicate that it is indifferent about its responsibilities.

[para20] Some of the cases that have been referred to me show a variation in sentencing from a few thousand dollars to a substantial amount of thousands of dollars. I have to recognize that the maximum penalty for a violation under the *Fisheries Act* has recently been increased from $50,000 to $300,000. I take the $300,000 maximum to be a penalty that would be applied to a bad offender in which the offence was as a result of bad circumstances, or bad conditions resulting in substantial injury to the environment by an indifferent or improperly operating business.

[para21] It has not been uncommon for courts to impose approximately one half the maximum penalty that existed before the increase has been put into effect. And that increase I mean as the maximum penalty now being $300,000.

[para22] Both Crown and Defence have suggested that since the maximum penalty has been increased by six fold that it may be appropriate for the court to consider a penalty that would be six times what the penalty for the same circumstances and the same offence would have been prior to the increase in the maximum amount. I am inclined to agree with that finding, and on that basis, I am taking into account (1) the fact that the company has already expended a substantial amount of

money on the outlays required for the operation of its business in immediately improving the situation that existed once it was found that the effluent did leak, (2) the cost of doing the tests to continue to report to both the government officials and the company over an extended period of time to ensure that the problem had been cancelled, (3) the cost of flying equipment to and from and flying testing people to and from the site. I must recognize the company has already spent probably in excess of $60,000 or $70,000 on that part of its co-operative effort to ensure that the offence did not continue.

[para23] I would expect that under the circumstances even though there appears to have been a substantial amount of fluid that had been seeping, that the court on the previous maximum of $50,000 would have considered a fine ranging between $10,000 and $15,000 for the offence.

[para24] I am therefore of the opinion that taking into account in this instance the good record of the company and its obvious attitude, that has been stressed by counsel today, a fine in the $50,000 range would have the effect of ensuring that the company continued its efforts to comply with the law, but also be of sufficient deterrence to other companies that for some reason or another do not stand up to the requirements of the law by failing to meet the legal [sic] of due diligence which is the legal standard under the *Fisheries Act*.

[para25] Under the circumstances I am going to impose a fine in the amount of $50,000 which I believe would have been higher had the accused been a corporation that had a different or poorer attitude than Echo Bay Mines has had. It might be appropriate for me to allow time for payment, or should I just in the ordinary way indicate that the fine is in effect, and distress in default thereof, or do you want me to make a recommendation as to when it should be paid?
[para26] MR. MALAKOE: I have already canvassed that with my clients, Your Honour. One month would be fine. I think the order can go that way.

[para27] THE COURT: Is that suitable with Crown that I indicate that $50,000 within a period of one month?

[para28] MR. WEBBER: Yes, Your Honour.

[para29] THE COURT: Is there anything further, Counsel, that is required?

[para30] MR. MALAKOE: Nothing further, Your Honour.

[para31] MR. WEBBER: No, sir.

[para32] THE COURT: Thank you. $50,000 within one month or distress to follow.

[para33] MR. MALAKOE: Thank you, Your Honour.

[para34] MR. WEBBER: Thank you.

FEDERAL COURT OF APPEAL

[Indexed as: Curragh Resources Inc. v. Canada (Minister of Justice)]

Curragh Resources Inc. (Appellant) v. Her Majesty the Queen in Right of Canada as represented by the Minister of Justice (Respondent) and The Selkirk First Nation and Ross River Dene Council (Intervenors)

Isaac C.J., Stone J.A. and Craig D.J.

Ottawa, June 29, 1993

Fisheries Act*, R.S.C. 1985, c. F-14, s. 37 – appellant proposed a mining project in Yukon – Ministers of Indian Affairs and Northern Development and Fisheries and Oceans conducted screening under the *Environmental Assessment and Review Process Guidelines Order* – Yukon Water Board issued water license with financial security requirement – Minister of Indian Affairs and Northern Development added additional security requirement to water license on approval – Water Board not required to comply with *Guidelines Order* – Minister of Indian Affairs and Northern Development a decision maker under the *Guidelines Order* entitled to add security requirement – s. 37(2) of the *Fisheries Act* is legislative, not regulatory – Minister of Fisheries and Oceans not a decision maker under the *Guidelines Order

Summary: This is an appeal from a judgement of the Federal Court of Canada – Trial Division. The dispute arose in respect to a proposed open-pit mine and waste dump on the Vangorda Plateau near Faro, Yukon. The appellant, a mining company, made application to the Yukon Water Board under the *Northern Inland Waters Act* for a water license for its proposed project. The proposed project was subjected to an initial screening under the *Environmental Assessment and Review Process Guidelines Order* by the Department of Indian Affairs and Northern Development. One recommendation from the review was that the appellant provide financial security to ensure that certain environmental matters were dealt with during the operation of the mine and after its closure. The Department of Fisheries and Oceans also undertook an environmental screening and and made a similar recommendation respecting financial security based on a concern for fish and fish habitat in the Vangorda Creek and the Pelly River.

The Yukon Water Board held a public hearing on the appellant's application for a water license. One major concern of the Board was the matter of long-term acid mine drainage and the need for financial security to fund post-closure water treatment. Accordingly, the Water Board attached a condition to the appellant's water license requiring security of $943,700, being 10% of the capital cost of the work. In granting his approval to the license as required by the Act, the Minister of Indian Affairs and Northern Development required that additional security of $4,406,000 be posted by the appellant for general mining reclamation and to ensure that post-closure water care was provided in perpetuity.

The question put to the learned Motions Judge was did the Crown have the authority under various statutes, including the *Fisheries Act*, to impose additional financial security requirements in view of

the decision of the Yukon Water Board, which question was answered in the affirmative. On appeal, the court addressed three issues. First, was the question of whether the Yukon Water Board was bound to apply the *Guidelines Order*. The court answered in the negative and found that the Water Board is not the final decision maker on water licenses and is only required to comply with its own legislation, the *Northern Inland Waters Act*. The requirements of the *Guidelines Order* are superadded responsibilities of the Minister in his role as final decision maker on water licenses.

The second issue was whether the Minister of Indian Affairs and Northern Development was an independent decision maker and entitled to rely on the *Guidelines Order* as a basis for requiring the appellant to post additional security. The court found that the Department of Indian Affairs and Northern Development was the decision making authority for the proposal. The Minister's responsibilities under the *Department of Indian Affairs and Northern Development Act* required the Minister to consider the impact of the proposed project on Indian people and wildlife in the Yukon, thereby triggering the requisite application of the *Guidelines Order* in considering the proposal. Therefore, the Minister was entitled to add a security requirement to the license as a condition of his approval.

The third issue was whether the Minister of Fisheries and Oceans was an independent decision maker thereby allowing the Minister to rely on the *Guidelines Order* as a basis for requiring the appellant to post additional security. Consistent with the decision of the Supreme Court of Canada in *Friends of the Oldman River Society* v. *Canada (Minister of Transport)* requiring an affirmative regulatory duty, the court determined that s. 37(2) of the *Fisheries Act* constitutes legislative power, not an affirmative regulatory duty. The Department of Fisheries and Oceans was not the decision making authority for the proposal, and as such the Minister could not rely on the *Guidelines Order* for the additional security requirement.

Held: The Minister of Indian Affairs and Northern Development could require additional financial security and the Minister of Fisheries and Oceans could not

REASONS/MOTIF:

William V. Sasso and Paul G. MacDonald, Counsel for the Appellant
Donald J. Rennie and Jeseph C. de Pencier, Counsel for the Respondent
Arthur Pape and J. Harper, Counsel for the Intervenors

[para1] STONE J.A.:-- This is an appeal from a judgment of the Trial Division rendered January 14, 1992 [[1992] 2 F.C. 243] in an application under Rule 474(1) of the *Federal Court Rules* [C.R.C., c. 663], [See Note 1 below] whereby the learned Motions Judge answered in the affirmative the following question which was put to him for determination [at page 247]:

Note 1: R. 474(1) reads:

> Rule 474. (1) The Court may, upon application, if it deems it expedient so to do, (a) determine any question of law that may be relevant to the decision of a matter, or (b)

> determine any question as to the admissibility of any evidence (including any document or other exhibit), and any such determination shall be final and conclusive for the purposes of the action subject to being varied upon appeal.

> Does the Crown in Right of Canada as represented by the Minister of Indian Affairs and Northern Development and/or the Minister of Fisheries and Oceans have authority under the *Environmental Assessment and Review Process Guidelines Order*, the *Northern Inland Waters Act*, the *Territorial Lands Act* and the *Fisheries Act*, or otherwise at law, to impose mitigative and compensatory measures, including monetary or other security, in respect of the Vangorda Project, a Project being developed by the plaintiff in the Yukon Territory on land owned by the defendant Her Majesty the Queen, in light of the decision of the Yukon Territory Water Board dated September 12, 1990?

The dispute centres upon the appellant's contention that neither the Minister of Indian Affairs and Northern Development nor the Minister of Fisheries and Oceans possessed legal authority to require the posting of financial security by the appellant in addition to that required to be posted by the Yukon Territory Water Board (the "Water Board") as a condition of a water licence issued pursuant to its decision of September 12, 1990.

[para2] As we shall see, the Water Board is a creature of statute, having been established under the *Northern Inland Waters Act*, R.S.C., 1985, c. N-25. It is vested with the powers conferred on it by that statute, among which is that of issuing a water licence to use waters in association with the operation of a particular undertaking and in a quantity and at a rate not exceeding that specified in a licence.

[para3] The Ministers in question are vested with a variety of statutory powers and responsibilities. In addition to being the Minister responsible in this matter under the *Northern Inland Waters Act*, the Minister of Indian Affairs and Northern Development possesses certain powers and responsibilities under the Department of Indian Affairs and *Northern Development Act*, R.S.C., 1985, c. I-6 and, in certain circumstances, under the *Environmental Assessment and Review Process Guidelines Order*, SOR/84-467 (the "*Guidelines Order*") made pursuant to section 6 of the *Department of the Environment Act*, R.S.C., 1985, c. E-10. The Minister of Fisheries and Oceans under the *Department of Fisheries and Oceans Act*, R.S.C., 1985, c. F-15 is responsible for the administration of the *Fisheries Act*, R.S.C., 1985, c. F-14.

BACKGROUND

[para4] In December 1989, the appellant, a mining company, made an application to the Water Board for a water licence pursuant to the *Northern Inland Waters Act*, in respect of its proposed open-pit mines and waste dumps on the Vangorda Plateau near Faro, Yukon Territory (collectively referred to herein as the "Vangorda Project"). The location of the minesite is described in the evidence as follows:

> The minesite is located at the centre of the Vangorda watershed, which drains to the Pelly River. The West Fork of Vangorda Creek drains the west half of the watershed and Vangorda Creek, with Dixon and Shrimp tributaries, drains the east. The Grum pit lies on a gently sloping broad plateau which forms a local drainage divide. The south-facing slope of the plateau sheds run-off directly into Vangorda Creek. The North and West slopes drain to the small tributaries. The waste dumps will be located on a westerly tending ridge which drains partially to Vangorda Creek.
>
> The Vangorda pit is located across the present channel of Vangorda Creek and, as the pit develops, flow in the creek will be diverted through a culvert constructed on a perimeter bench within the pit. Upon abandonment the pit will be flooded. [See Note 2 below]

Note 2: Department of Indian Affairs and Northern Development. Screening Report, July 20, 1990.

The Vangorda Creek and the upper Pelly River areas are within the traditional territory of the Kaska people of the Ross River Dene Council. The downstream Pelly River area is within the traditional territory of the Selkirk First Nation. Both communities rely on the salmon and other fishery resources of these waters. They have harvesting camps throughout the areas and use the waters for travel to traditional fishing and trapping locations and for drinking water. They are the intervenors in this appeal.

[para5] An environmental screening or initial assessment of the Vangorda Project was conducted by a regional environmental review committee under subsection 10(1) of the *Guidelines Order* at the behest of the Minister of Indian Affairs and Northern Development. This assessment is contained in a screening report of July 20, 1990, in which the Review Committee concluded:

> The Regional Environmental Review Committee has concluded that Curragh Resources Inc. has submitted adequate information on which to conclude its review. RERC recommends that the Curragh Resources Vangorda Plateau Development proposal meets the requirements of the *Environmental Assessment and Review Process Guidelines Order* under Section 12(c) as set out below and that the proposal with mitigations as identified in the Initial Environmental Evaluation and this report now proceed to the regulatory process for issuance of the necessary licences, leases and permits.
>
> Sec. 12.(c) "the potential adverse environmental effects that may be caused by the proposal are insignificant or mitigable with known technology, in which case the case may proceed or proceed with mitigation, as the case may be;"
>
> Pursuant to Section 13 of the *Order*, the Regional Environmental Review Committee recommends that a public review by an EARP panel is not necessary.

> Sec. 13. "Notwithstanding the determination concerning a proposal made pursuant to Section 12, if public concern about the proposal is such that a public review is desirable, the initiating department shall refer the proposal to the Minister for public review by a panel."

The Report specifically recommended:

> 8. That adequate financial security be provided by Curragh Resources to the Government of Canada prior to issuance of the water licence and surface lease to ensure that the control measures specified for acid mine drainage mitigation and other identified impacts both during mine operation and after closure are implemented . . . .

[para6] The Department of Fisheries and Oceans also conducted an initial assessment and screening of the Vangorda Project, as a result of which a recommendation was made similar to that contained in the Screening Report of July 20, 1990. The Department was concerned with the impact of the Project on fish and fish habitat, particularly on the salmon and Arctic grayling in the Vangorda Creek and the Pelly River. Based on its assessment, the Department concluded that "without adequate mitigation it is highly likely that the mine will produce acid mine drainage (AMD) containing metals that could adversely affect downstream water quality and fisheries resources" and that additional security should be furnished by the appellant so as to protect against these consequences.

[para7] A major concern of the Water Board in considering the water licence application was long-term acid mine drainage (AMD) into the Vangorda Creek and Pelly River and the mitigation thereof by, among other things, requiring the posting of financial security to fund post-closure water treatment. The Board held a public hearing into the matter, at which the two screening reports were filed and other evidence was received. Officers of the Department of Indian Affairs and Northern Development and the Department of Fisheries and Oceans were present and participated at the hearing. On September 12, 1990, the Water Board issued Water Licence IN89-002. By that licence the appellant is permitted to "obtain, store, divert, alter and return a flow of water" in connection with "[t]wo open pit mines, associated waste dumps and water treatment plant" subject to the several conditions attached thereto. The effective date of the licence is stated to be: "The date on which the signature of the Minister of Indian and Northern Affairs Canada is affixed." The Water Board attached the following condition [See Note 3 below] to the water licence:

> 3. Security
>
> In accordance with Section 13 of the Regulations, the Licensee shall provide security in the amount of $943,700.00 . . . representing ten percent of the capital cost of the work.

Note 3: The Water Board gave the following reasons, at p. 2 of its decision, for imposing this condition:

After considering the exhibits filed and the evidence presented to the Board during the hearing, the Board is of the opinion that the owners and occupiers of property are liable to be adversely affected as a result of the issuance of the licence to the applicant. Having made this finding under Section 13(3) of the Act, the Board may require the Licensee to furnish security in an amount not to exceed 10% of the capital cost of the work.

Considering that the Act is environmental legislation to protect the public at large and considering the Board's duty under Section 10 of the Act, a broad interpretation should be given to the definition of work. Therefore, in determining the quantum of security, the Board has rejected the proposal that credit should be given for money already expended and has agreed that calculations should be based on the cost of a party other than Curragh doing the work. Further, the Board rejects the recommendation that post-abandonment costs related to the operation of the water treatment plant could be included in a definition of capital works. Based on these parameters, security shall be posted in the amount of $943,700.

[para8] The Minister of Indian Affairs and Northern Development granted his approval of the licence on October 25, 1990. As a condition to this approval, the Minister required that the appellant post the additional security. To that end, by a written agreement of September 28, 1990, the appellant undertook to furnish the respondent with additional security in the amount of $4,406,000 by October 5, 1990. Such security was intended to cover general mining reclamation and insure that post-closure water treatment was provided in perpetuity. By the same agreement the appellant undertook to establish a trust fund to be used in perpetuity to cover the cost of post-closure water treatment according to standards established in the water licence. The Minister of Indian Affairs and Northern Development covenanted therein to "approve the water licence . . . when Curragh has executed this agreement and provided Canada the additional security." At the time the agreement was signed it was acknowledged that the appellant signed under protest and that it might challenge the respondent's entitlement to request the additional security.

ISSUE

[para9] The narrow issue on this appeal is whether the Motions Judge erred in answering the above recited question as he did, thereby deciding that the authority of the Water Board with respect to the issuance of a water licence under the *Northern Inland Waters Act* did not oust the authority of either the Minister of Indian Affairs and Northern Development or the Minister of Fisheries and Oceans under the *Guidelines Order*, to require the posting of the additional security by the appellant.

LEGISLATIVE PROVISIONS

[para10] The legislative provisions which are relevant to the issue are set forth in the *Northern Inland Waters Act* and the regulations thereunder, the *Territorial Lands Act* [R.S.C., 1985, c. T-7] and the regulations thereunder, the *Department of Indian Affairs and Northern Development Act*, the *Fisheries Act*, the *Department of Fisheries and Oceans Act*, the *Department of the Environment*

Act and the *Guidelines Order* made pursuant thereto. The specific provisions relied upon in argument are the following:

> *Northern Inland Waters Act*
>
> 4. (1) Subject to any rights, powers or privileges granted pursuant to the *Dominion Water Power Act* or preserved under that Act and to section 5 of this Act, the property in and the right to the use and flow of all waters are for all purposes vested in Her Majesty in right of Canada.
>
> (2) Except as authorized pursuant to the *Dominion Water Power Act*, and subject to section 5 of this Act, no person shall alter or divert the flow or storage of waters within a water management area or otherwise use waters within any such area except pursuant to a licence held by that person or except as authorized by regulations made pursuant to paragraph 29(g).
>
> (3) Except as specifically provided in this Act or any other Act, no provision of this Act or the regulations, or licence issued pursuant to this Act, authorizes the alteration or diversion of the flow or storage of waters within a water management area or any other use of waters within any such area in contravention of any provision of any other Act or any regulation made pursuant to any other Act.
>
> . . .
>
> 8. (1) There are hereby established two boards, one to be known as the Yukon Territory Water Board and the other as the Northwest Territories Water Board, each consisting of not less than three or more than nine members appointed by the Minister.
>
> . . .
>
> 10. The objects of the boards are to provide for the conservation, development and utilization of the water resources of the Yukon Territory and the Northwest Territories in a manner that will provide the optimum benefit therefrom for all Canadians and for the residents of the Yukon Territory and the Northwest Territories in particular.
>
> 11. (1) Subject to subsection (2), a board may, with the approval of the Minister, issue licences, for a term not exceeding twenty-five years, authorizing the applicant for such a licence, on payment of water use fees prescribed pursuant to paragraph 31(1)(a) at the times and in the manner prescribed by the regulations, to use waters, in association with the operation of a particular undertaking described in the licence and in a quantity and at a rate not exceeding that specified in the licence.
>
> (2) Where an application for a licence referred to in subsection (1) is made, the board shall not issue a licence unless it is satisfied that

(a) the proposed use of waters by the applicant will not adversely affect the use of waters within the water management area to which the application relates by any licensee who is entitled to precedence over the applicant pursuant to section 25 or by any applicant who, if a licence were issued to him, would be entitled to precedence over the applicant pursuant to that section;

(b) appropriate compensation has been or will be paid by the applicant to licensees who are authorized to use waters within the water management area to which the application relates for a use that, in relation to that water management area, is of lower priority than the proposed use by the applicant and who will be adversely affected by the proposed use;

(c) any waste that will be produced by the undertaking in association with the operation of which the waters will be used will be treated and disposed of in a manner that is appropriate for the maintenance of water quality standards prescribed pursuant to paragraph 29(e); and

(d) the financial responsibility of the applicant is adequate for the undertaking in association with the operation of which the waters will be used.

12. (1) Subject to subsections (2) and (3), a board may attach to any licence issued by it any conditions that it considers appropriate, including conditions relating to the manner of use of waters authorized to be used under the licence and conditions based on water quality standards prescribed pursuant to paragraph 29(e) relating to the quantity and types of waste that may be deposited in any waters by the licensee and the conditions under which any such waste may be so deposited.

. . .

13. (1) An application for a licence shall be in such form and shall contain such information as is prescribed by the regulations.

(2) A board shall require an applicant for a licence to provide it with such information and studies concerning the use of waters proposed by the applicant as will enable it to evaluate any qualitative and quantitative effects of the proposed use on the water management area in which the applicant proposes to use the waters.

(3) A board may require an applicant for a licence to furnish security, in a form and on terms and conditions prescribed by regulations, for the protection of licensees and owners and occupiers of property who, in the opinion of the board, are liable to be adversely affected as a result of the issuance of a licence to the applicant.

. . .

23. Except as provided in this *Act*, every decision or order of a board is final and conclusive.

Northern Inland Waters Regulations [C.R.C., c. 1234]

13. (1) The board may require an applicant for a licence to furnish security in an amount determined by the board, but in no case shall the amount exceed $100,000 or 10 per cent of the estimated capital cost of the work, whichever is the greater.

Territorial Lands Act

8. Subject to this Act, the Governor in Council may authorize the sale, lease or other disposition of territorial lands and may make regulations authorizing the Minister to sell, lease or otherwise dispose of territorial lands subject to such limitations and conditions as the Governor in Council may prescribe.

Territorial Lands Regulations [C.R.C., c. 1525]

12. Every lease of territorial lands shall contain, in addition to such terms and conditions as the Minister may deem necessary, a reservation of . . . .

Department of Indian Affairs and Northern Development Act

4. The powers, duties and functions of the Minister extend to and include all matters over which Parliament has jurisdiction, not by law assigned to any other department, board or agency of the Government of Canada, relating to

(a) Indian affairs;

(b) The Yukon Territory and the Northwest Territories and their resources and affairs;

Department of Fisheries and Oceans Act

4. (1) The powers, duties and functions of the Minister extend to and include all matters over which Parliament has jurisdiction, not by law assigned to any other department, board or agency of the Government of Canada, relating to

(a) sea coast and inland fisheries;

(b) fishing and recreational harbours;

(c) hydrography and marine sciences; and

(d) the coordination of the policies and programs of the Government of Canada respecting oceans.

(2) The powers, duties and functions of the Minister also extend to and include such other matters, relating to oceans and over which Parliament has jurisdiction, as are by law assigned to the Minister.

Fisheries Act

37. (1) Where a person carries on or proposes to carry on any work or undertaking that results or is likely to result in the alteration, disruption or destruction of fish habitat, or in the deposit of a deleterious substance in water frequented by fish or in any place under any conditions where that deleterious substance or any other deleterious substance that results from the deposit of that deleterious substance may enter any such waters, the person shall, on the request of the Minister or without request in the manner and circumstances prescribed by regulations made under paragraph (3)(a), provide the Minister with such plans, specifications, studies, procedures, schedules, analyses, samples or other information relating to the work or undertaking and with such analyses, samples, evaluations, studies or other information relating to the water, place or fish habitat that is or is likely to be affected by the work or undertaking as will enable the Minister to determine

(a) whether the work or undertaking results or is likely to result in any alteration, disruption or destruction of fish habitat that constitutes or would constitute an offence under subsection 40(1) and what measures, if any, would prevent that result or mitigate the effects thereof; or

(b) whether there is or is likely to be a deposit of a deleterious substance by reason of the work or undertaking that constitutes or would constitute an offence under subsection 40(2) and what measures, if any, would prevent that deposit or mitigate the effects thereof.

(2) If, after reviewing any material or information provided under subsection (1) and affording the persons who provided it a reasonable opportunity to make representations, the Minister or a person designated by the Minister is of the opinion that an offence under subsection 40(1) or (2) is being or is likely to be committed, the Minister or a person designated by the Minister may, by order, subject to regulations made pursuant to paragraph 3(b), or, if there are no such regulations in force, with the approval of the Governor in Council,

(a) require such modifications or additions to the work or undertaking or such modifications to any plans, specifications, procedures or schedules relating thereto as the Minister or a person designated by the Minister considers necessary in the circumstances, or

(b) restrict the operation of the work or undertaking, and, with the approval of the Governor in Council in any case, direct the closing of the work or undertaking for such period as the Minister or a person designated by the Minister considers necessary in the circumstances.

Department of the Environment Act

4. (1) The powers, duties and functions of the Minister extend to and include all matters over which Parliament has jurisdiction, not by law assigned to any other department, board or agency of the Government of Canada, relating to

(a) the preservation and enhancement of the quality of the natural environment, including water, air and soil quality;

(b) renewable resources, including migratory birds and other non-domestic flora and fauna;

(c) water;

. . .

6. For the purposes of carrying out his duties and functions related to environmental quality, the Minister may, by order, with the approval of the Governor in Council, establish guidelines for use by departments, boards and agencies of the Government of Canada and, where appropriate, by corporations named in Schedule III to the *Financial Administration Act* and regulatory bodies in the exercise of their powers and the carrying out of their duties and functions.

Environmental Assessment and Review Guidelines Order

2. In these Guidelines,

. . .

"initiating department" means any department that is, on behalf of the Government of Canada, the decision making authority for a proposal;

"Minister" means the Minister of the Environment;

. . .

"proposal" includes any initiative, undertaking or activity for which the Government of Canada has a decision making responsibility.

3. The Process shall be a self assessment process under which the initiating department shall, as early in the planning process as possible and before irrevocable decisions are taken, ensure that the environmental implications of all proposals for

which it is the decision making authority are fully considered and where the implications are significant, refer the proposal to the Minister for public review by a Panel.

. . .

5. (1) Where a proposal is subject to environmental regulation, independently of the Process, duplication in terms of public reviews is to be avoided.

(2) For the purpose of avoiding the duplication referred to in subsection (1), the initiating department shall use a public review under the Process as a planning tool at the earliest stages of development of the proposal rather than as a regulatory mechanism and make the results of the public review available for use in any regulatory deliberations respecting the proposal.

6. These Guidelines shall apply to any proposal

. . .

> (b) that may have an environmental effect on an area of federal responsibility;

. . .

> (d) that is located on lands, including the offshore, that are administered by the Government of Canada.

. . .

8. Where a board or agency of the Government of Canada or a regulatory body has a regulatory function in respect of a proposal, these *Guidelines* shall apply to that board, agency or body only if there is no legal impediment to or duplication resulting from the application of these *Guidelines*.

. . .

10. (1) Every initiating department shall ensure that each proposal for which it is the decision making authority shall be subject to an environmental screening or initial assessment to determine whether, and the extent to which, there may be any potentially adverse environmental effects from the proposal.

(2) Any decisions to be made as a result of the environmental screening or initial assessment referred to in subsection (1) shall be made by the initiating department and not delegated to any other body.

. . .

> 12. Every initiating department shall screen or assess each proposal for which it is the decision making authority to determine if
>
> . . .
>
> > (c) the potentially adverse environmental effects that may be caused by the proposal are insignificant or mitigable with known technology, in which case the proposal may proceed or proceed with the mitigation, as the case may be;
>
> . . .
>
> 13. Notwithstanding the determination concerning a proposal made pursuant to section 12, if public concern about the proposal is such that a public review is desirable, the initiating department shall refer the proposal to the Minister for public review by a Panel.
>
> 14. Where, in any case, the initiating department determines that mitigation or compensation measures could prevent any of the potentially adverse environmental effects of a proposal from becoming significant, the initiating department shall ensure that such measures are implemented.

THE JUDGMENT BELOW

[para11] In his analysis, the Motions Judge first addressed the question of whether the *Guidelines Order* applied to the proceedings before the Water Board under the *Northern Inland Waters Act* and determined that they did so apply. The Water Board had not found it necessary to decide whether the Guidelines Order applied to its process, [See Note 4 below] although it did express some concern "that there would be duplication between NIWA and EARP if upon the completion of a public hearing as required under *Northern Inland Waters Act*, there is a further public review by a panel under paragraph 13 of the EARP guidelines." The Motions Judge was of the view that the application of the *Guidelines Order* to the Water Board's process was unaffected by the circumstance that the Water Board was itself vested with authority under section 10 of the *Northern Inland Waters Act* to "provide for the conservation . . . of the water resources of the Yukon Territory" and generally to protect and maintain water quality standards. He stated, at pages 275-276:

Note 4: At p. 12 of its decision, the Water Board stated:

> The Board finds that it is not an initiating department within the meaning of the EARP guidelines since it is not a department that on behalf of the Government of Canada is the decision making authority for a proposal. The Board recognizes that it is DIAND that is in fact the initiating department with respect to the EARP screening report.

Notwithstanding the above, the Board is of the opinion that the substantive EARP recommendations as they pertain to the Board's mandate have been appropriately addressed in this licence and therefore the issue of whether or not EARP applies does not have to be answered in these reasons.

> Given these broad powers the question might not be if the EARP Guidelines apply but how, in practice, do they apply? It may be difficult to see what added benefit the *EARP Guidelines Order* can provide the Water Board which is already endowed with powers to address water quality. However, given the complexity of the issues, the ever growing public demand for environmental protection and the potentially devastating effects which may result from legislative gaps, I believe it is consistent with the scope and intent of the provisions that the Water Board have all the necessary power to address any problem which may arise. In this light, it can be seen that the *EARP Guidelines Order* merely assists the Water Board in the exercise of its duties. The degree of assistance provided will depend on the individual issue and it may be that, given the broad powers conferred by the *Northern Inland Waters Act*, it will not often be of assistance at all. It is however an added safeguard. I would say that, subject to section 8 of the *EARP Guidelines Order*, the *Guidelines Order* does apply to the Yukon Territory Water Board.
>
> Section 8 of the *EARP Guidelines Order* provides that the *Guidelines* shall apply to a regulatory body which has a regulatory function in respect of a proposal "only if there is no legal impediment to or duplication resulting from the application of these *Guidelines*".
>
> On the facts of the present case the Water Board had before it the Screening Reports of the Minister of Indian Affairs and Northern Development and the Minister of Fisheries and Oceans. Both these reports dealt extensively with the environmental impacts related to water use including long term effects to the fish habitat and water quality standards. The reports covered every matter which the Board was mandated to consider. In this context for the Board to require an additional environmental screening would not only have been a waste of time and resources but a very real duplication of process wholly unnecessary under the circumstances.

[para12] The Motions Judge was also of the opinion that, having regard to the powers, duties and responsibilities vested in the Minister of Indian Affairs and Northern Development under the *Department of Indian Affairs and Northern Development Act*, the *Northern Inland Waters Act*, the *Territorial Lands Act* and the *Guidelines Order*, the Minister possessed the authority to require the posting of additional security as a condition to approving the licence, notwithstanding the powers vested in the Water Board under the *Northern Inland Waters Act*. He stated, at page 278-279:

> If, as suggested by the plaintiff, the *EARP Guidelines* cannot apply to the Water Board and they also cannot apply to the Minister because he is bound by the Water Board's decision, the result would be that the entire protection of the environment as it relates to water use would rest solely with the Water Board. Given that the Board has limited authority to impose some form of security, there is what might be termed residual or continuing

> authority in the Minister to impose an additional level of security under the *EARP Guidelines*. Any other view would create an impasse. If an initiating department's findings pursuant to section 12(c) are to the effect that additional security should be imposed, the Water Board would be helpless to deal with it.

He also pointed to the limitation laid down in subsection 13(1) of the *Northern Inland Waters Regulations*, and concluded that this left it open for the Minister to require the additional security as a condition to approving the water licence.

[para13] Finally, the Motions Judge concluded that the Minister of Fisheries and Oceans was obliged to apply the *Guidelines Order* and that, in doing so, he could require the appellant to post additional security. He stated, at page 280:

> I will deal briefly with this question. Under subsection 35(1) and specifically subsection 37(1) and paragraphs 37(2)(a) and 37(2)(b) of the *Fisheries Act* the Minister of Fisheries and Oceans has the legal authority to restrict the operation of a work or undertaking or to require modifications thereto when the work or undertaking results in the harmful alteration, disruption or destruction of fish habitat. This decision-making authority required the Minister to comply with the *EARP Guidelines Order*. It was therefore another initiating department and pursuant to section 9 of the *EARP Guidelines Order* DFO and DIAND determined that DIAND would ensure that the required financial security was in place.

DISCUSSION

[para14] The issue as it was presented by the appellant may be broken down into three separate questions. First, did the Motions Judge err in determining that the Water Board was bound to apply the *Guidelines Order*? Secondly, did the Motions Judge err in holding that the Minister of Indian Affairs and Northern Development was an independent federal decision-making authority and was entitled to rely on the *Guidelines Order* as a basis for requiring the appellant to post additional security as a condition to approving the water licence? Thirdly, did the Motions Judge err in deciding that the Minister of Fisheries and Oceans was also an independent federal decision-making authority who was entitled to rely on the *Guidelines Order* as a basis for requiring the appellant to post security, in addition to that required by the Water Board and the Minister of Indian Affairs and Northern Development, or to delegate his authority to such Minister in exercise of his decision-making authority under the *Fisheries Act*?

[para15] It is appropriate to observe at this stage that since the judgment which is under attack was rendered, the Supreme Court of Canada has dealt with the legal and constitutional status of the *Guidelines Order* in *Friends of the Oldman River Society* v. *Canada (Minister of Transport)*, [1992] 1 S.C.R. 3. At pages 37-38, La Forest J., speaking for the majority, held that the Order "has been validly enacted . . . and is mandatory in nature." At page 37, La Forest J. describes the environment as "a diffuse subject matter" and that, subject to constitutional imperatives, "the potential consequences for a community's livelihood, health and other social matters from environmental change are integral to decision making on matters affecting environmental quality".

[para16] The Water Board's authority for issuing licences under the *Northern Inland Waters Act* appears to be far less embracive than that of the Minister in approving licences. Its principal concern is with the use of waters, the impact of the authorized operation on the licensees of the same and, to an extent, on the quality of water. This mandate would not appear to include any responsibility for determining the impact of the appellant's undertaking on the intervenors, a responsibility which fell upon the Minister himself as the final decision-maker. The *Guidelines Order* superadds this responsibility to the power which the Minister otherwise possessed. See *Oldman River*, supra, per La Forest J., at pages 39-40. The Minister's power under that subsection is, to my mind, of transcendental importance for, in the final analysis, he is free to grant or refuse his approval of a water licence and in making that determination is in no way fettered by the Water Board's decision.

[para17] I agree, as the appellant pointed out in argument, that the answer to the first question will be rendered "academic" by the answers to the remaining questions. Nevertheless, based on my analysis of the relevant legislative provisions, I would not be prepared to say that, strictly speaking, the Water Board was bound to apply the *Guidelines Order*. In making its decision of September 12, 1990, the Water Board was required to carry out its own legislative mandate as conferred by the *Northern Inland Waters Act*. While that statute authorizes the Water Board to issue a licence, it may do so only "with the approval of the Minister" who thereby becomes the final decision-maker. In *Oldman River*, supra, it was made clear that, once it has been determined that the federal government has a decision-making responsibility for a "proposal", the "initiating department" is charged with the responsibility of implementing the Guidelines Order . In so deciding, La Forest J., adopted the following analysis of Décary J.A. in *Angus* v. *Canada*, [1990] 3 F.C. 410 (C.A.), at page 434:

> The emphasis has been put by the learned Trial Judge and by the respondents on the words "initiating department" which relate to the administration of the *Guidelines*. I would rather put the emphasis on the words "proposal" and "Government of Canada", which relate to the "application" of the *Guidelines*. There is no requirement, in the definition of "proposal", that it be made by an initiating department within the meaning of the *Guidelines*. The intention of the drafter seems to be that whenever there is an activity that may have an environmental effect on an area of federal responsibility and whoever the decision-maker may be on behalf of the Government of Canada, be it a department, a Minister, the Governor in Council, the *Guidelines* apply and it then becomes a matter of practical consideration, when the final decision-maker is not a department, to find which department or Minister is the effective original decision-maker or the effective decision-undertaker, for there is always a department or a Minister involved "in the planning process" and "before irrevocable decisions are taken" or in the "direct undertaking" of a proposal.

In my view, the Water Board was not bound to apply the *Guidelines Order* for the very reason that it was not the final decision-maker in respect of the water licence sought for the Vangorda Project. That decision-maker was the Minister who was the only person charged by statute with the responsibility for approving the licence and without whose approval the licence could not be valid.

[para18] Before answering the remaining questions, it will be useful to offer a brief analysis of the *Northern Inland Waters Act* with respect to the issuance of water licences. The objects of the

Water Board, as set forth in section 10, are "to provide for the conservation, development and utilization of the water resources of the Yukon Territory . . . in a manner that will provide the optimum benefit . . . for all Canadians and for residents of the Yukon Territory . . . in particular." The Water Board is vested with a particular power under subsection 11(1) to issue licences "to use waters, in association with the operation of a particular undertaking described in the licence"; before issuing a licence the Water Board must be satisfied in accordance with subsection 11(2) that the proposed use of waters by an applicant will not adversely affect the use of waters by some other licensees, that appropriate compensation has or will be paid by the applicant to some other licensees, that any waste produced by the proposed undertaking will be treated and disposed of in an appropriate manner and that financial responsibility of the applicant is adequate for the undertaking; the Water Board is empowered pursuant to subsection 12(1) to attach conditions to any licence it may decide to issue; and is further empowered under subsection 13(2) to secure information in respect of "the use of waters"; the Water Board is also authorized [under subsection 13(3)] to require an applicant to "furnish security . . . for the protection of licensees and owners and occupiers of property who, in the opinion of the board, are liable to be adversely affected as a result of the issuance of a licence". Under section 23, a decision of the Water Board is final and conclusive "[e]xcept as provided in this *Act*". While the Water Board is vested with the primary responsibility for considering an application for a water licence and its powers of investigation are extensive, no licence may be validly issued unless it is approved by the Minister pursuant to subsection 11(1).

[para19] I now proceed to the second question. The appellant contends that the *Northern Inland Waters Act* and its regulations constitute "specific purpose" environmental legislation which sets forth a comprehensive and exhaustive code governing the terms and conditions under which a water licence may issue and the security which the holder of such a licence may be required to post. The powers of the Minister of Indian Affairs and Northern Development under section 4 of the *Department of Indian Affairs and Northern Development Act* and those of the Minister of Fisheries and Oceans under subsection 4(1) of the *Department of Fisheries and Oceans Act*, on the other hand, extend only to "jurisdiction, not by law assigned to any other department, board or agency of the Government of Canada". It is argued from this that neither of the Ministers in question has been assigned the power of issuing a water licence or of imposing conditions thereon because that authority has been expressly assigned to the Water Board under the *Northern Inland Waters Act*. There was, therefore, no authority in either Minister to require additional security. I am unable to agree. While it is true that Parliament conferred authority on the Water Board to issue the water licence and to impose conditions thereon, that authority is limited in that, in order to be valid, the licence had to be approved by the Minister of Indian Affairs and Northern Development pursuant to subsection 11(1) of this last referred statute.

[para20] In my view, this question should be answered in the negative. It seems to me that through a combination of sections 3 and 6 of the *Guidelines Order*, the Department of Indian Affairs and Northern Development as the "initiating department", was required to consider whether a proposal "may have an environmental effect on an area of federal responsibility" or "is located on lands . . . that are administered by the Government of Canada". Section 2 defines "initiating department" as "any department that is, on behalf of the Government of Canada, the decision making authority for a proposal". The Vangorda Project was a "proposal" that "may have an environmental effect on an area of federal responsibility" and the Minister of Indian Affairs and

Northern Development was the effective decision-maker of whether the water licence should be approved. The application of the Guidelines Order was thereby triggered. Under section 4 of the *Department of Indian Affairs and Northern Development Act*, this Minister was made responsible for "all matters over which Parliament has jurisdiction, not by law assigned to any other department, board or agency of the Government of Canada, relating to (a) Indian affairs; (b) the Yukon Territory . . . and their resources and affairs". In my view, this required the Minister to consider the impact of the Vangorda Project on the Indian people and on wildlife in the Yukon Territory. It follows that the Minister was entitled to rely on the *Guidelines Order* in requiring the additional security as a condition to his approval of the water licence.

[para21] Nor am I persuaded that the Minister's compliance with the *Guidelines Order* would involve a duplication of the environmental impact review. It is true that the *Guidelines Order* is designed to avoid duplication of environmental assessments in respect of the same proposal. By section 5, duplication in terms of public reviews is to be avoided where "a proposal is subject to environmental regulation, independently of the Process". By section 8, a board or agency of the Government of Canada or a regulatory body that has a regulatory function in respect of a proposal is required to apply the *Guidelines Order* "if there is no legal impediment to or duplication resulting from the application of these *Guidelines.*" In the present case, section 5 can have no application because the Vangorda Project did not progress to a public review under section 3 or 13 of the *Guidelines Order*. The Minister, it seems, was satisfied under paragraph 12(c) that no public review was required because the environmental effects were either insignificant or were mitigable with known technology. Nor can I see that section 8 can have any application when the Water Board was not bound to carry out an environmental assessment in accordance with the *Guidelines Order*.

[para22] I am also of the view that the jurisdiction of the Minister of Indian Affairs and Northern Development to decide whether a surface lease should be granted under section 8 of the *Territorial Lands Act* and section 12 of the *Territorial Lands Regulations* was not ousted by the *Northern Inland Waters Act*. It seems to me that this too was a "proposal" or, at least, part of the appellant's proposed undertaking, for without a surface lease the Vangorda Project could simply not proceed. As the "initiating department" [See Note 5 below] under the *Guidelines Order*, the Minister was required to subject the "proposal" to an environmental screening or initial assessment to determine any potential adverse environmental effects. The Screening Report of July 20, 1990, expressed concern about the proposal's impact on wildlife, and a recommendation was made that:

Note 5: I have treated the Minister, as head of the Department of Indian affairs and Northern Development, as the "initiating department". See Oldman River, supra, at p. 48, where La Forest J. treated the Minister of Transport as the "initiating department" for the particular "proposal".

> When considering the issuance of a surface lease for this project, the mitigation measures relating to land use including those relating to wildlife be included in the terms of the lease.

The Vangorda Project is "located on lands . . . that are administered by the Government of Canada" under paragraph 6(d) of the *Guidelines Order*. The application for the surface lease again triggered the application of the *Guidelines Order*. In my view, because of concern for the wildlife on the affected lands, the Minister's jurisdiction to require additional security on this ground as well was not ousted by the *Northern Inland Waters Act*.

[para23] I turn finally to the third question. It concerns whether the Minister of Fisheries and Oceans was correct in treating himself as an independent federal decision-maker and entitled to rely on the *Guidelines Order* as a basis for requiring the appellant to post additional security. That stance might well have been influenced by the views expressed by this Court in *Friends of the Oldman River Society* v. *Canada (Minister of Transport)*, [1990] 2 F.C. 18, at pages 42-48, that the Minister of Fisheries and Oceans was to be regarded as a "decision making authority" who was dealing with a "proposal" within the meaning of the *Guidelines Order* in rejecting a request that he seek information under subsection 37(1) of the *Fisheries Act*.

[para24] In *Oldman River*, supra, the Supreme Court of Canada disagreed with that view. It was there decided, per La Forest J. at page 47, that under the *Guidelines Order* there must be "an affirmative regulatory duty for a `decision making responsibility' to exist". This was made clear by La Forest J., at pages 48-49 where he stated:

> There is, however, no equivalent regulatory scheme under the *Fisheries Act* which is applicable to this project. Section 35 prohibits the carrying on of any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat, and s. 40 lends its weight to that prohibition by penal sanction. The Minister of Fisheries and Oceans is given a discretion under s. 37(1) to request information from any person who carries on or proposes to carry on any work or undertaking that will or may result in the alteration, disruption or destruction of fish habitat. However, the purpose of making such a request is not to further a regulatory procedure, but is merely to assist the Minister in exercising an ad hoc delegated legislative power granted under s. 37(2) to allow an exemption from the general prohibition.

Later, at pages 49-50, the learned Justice added the following:

> In my view a discretionary power to request or not to request information to assist a Minister in the exercise of a legislative function does not constitute a decision-making responsibility within the meaning of the *Guidelines Order*. Whereas the Minister of Transport is responsible under the terms of the *Navigable Waters Protection Act* in his capacity as regulator, the Minister of Fisheries and Oceans under s. 37 of the *Fisheries Act* has been given a limited ad hoc legislative power which does not constitute an affirmative regulatory duty. For that reason, I do not think the application for mandamus to compel the Minister to act is well founded.

[para25] La Forest J. draws a distinction between the performance of an affirmative regulatory duty and the exercise of a legislative power. Only in the case of the first of these would a government department be exercising a decision-making responsibility under the *Guidelines Order*. While in that case it was found that such a duty rested on the Minister of Transport who could grant

or refuse a permit for dam construction on navigable waters under the *Navigable Waters Protection Act*, R.S.C., 1985, c. N-22, no duty of that kind rested on the Minister of Fisheries and Oceans under section 37 of the *Fisheries Act*. In *Carrier-Sekani Tribal Council* v. *Canada (Minister of the Environment*), [1992] 3 F.C. 316, (C.A.), Marceau J.A. made the following observations as to the scope of La Forest J.'s opinion, at page 338:

> I do not think that La Forest J. ever had in mind, in discussing the discretion of the Minister of Fisheries and Oceans to request information under section 37, the actual exercise of the powers he has under subsection 37(2) to impose modifications, additions or restrictions to a proposed work or undertaking.

It should be noted that La Forest J. was addressing the Minister's decision not to request information under subsection 37(1) of the *Fisheries Act*, a decision which he viewed as wholly discretionary. Nevertheless, it does seem to me that the broad principle which La Forest J. lays down in *Oldman River*, supra, requires a conclusion that the Minister of Fisheries and Oceans, pursuant to subsection 37(2) of the *Fisheries Act*, exercised a legislative power rather than an affirmative regulatory duty and, accordingly, in this case he could not require the additional security. The Department of Fisheries and Oceans was not the "decision making authority for a proposal" under the *Guidelines Order*.

DISPOSITION

[para26] I would allow the appeal in part by answering the question put for determination in the affirmative as regards the Crown in right of Canada as represented by the Minister of Indian Affairs and Northern Development and in the negative as regards the Crown in the right of Canada as represented by the Minister of Fisheries and Oceans. As success has been divided, I would make no order as to costs in this appeal or in the Trial Division.

NORTHWEST TERRITORIAL COURT

[Indexed as: R. v. Northwest Territories (Commissioner) #1]

Between Her Majesty the Queen as Represented by Environment Canada, and Her Majesty the Queen in Right of Canada as Represented by the Commissioner of the Northwest Territories

Bourassa J.

Yellowknife, July 20, 1993

Fisheries Act*, R.S.C. 1985, c. F-14, ss 36(3), 36(4) – application for non-suit for failure to prove elements of offence – application denied – essential elements of offence under s. 36(3) include: date, person, location, unlawful deposit or permitting of unlawful deposit, deleterious substance, place of deposit, circumstances where substance could or did get, into waters frequented by fish – Crown does not need to prove the non-application of s. 36(4) of the *Fisheries Act

Criminal Procedure – application for non-suit – test is whether there is any evidence, direct or indirect, upon which a jury properly instructed could convict – threshold is whether a prima facie case has been made out

Summary: This is an application for a non-suit based on the alleged failure of the Crown to produce evidence on all essential elements of the case. The accused was charged with three counts under the *Fisheries Act* in respect to the collapse of a sewage lagoon in Iqualuit on June 1, 1992. A Water License had been issued to the Town of Iqualuit under the *Northern Inland Waters Act* for the use of certain waters and the discharge after use into a treatment facility. At the time of the incident the Town and defendant were negotiating a transfer of the sewage lagoon to the Town, but the Town had not yet assumed responsibility for the work.

The learned judge determined that the appropriate test in an application for non-suit was whether there is any evidence, direct or indirect, upon which a jury properly instructed could convict – the appropriate threshold is whether a prima facie case has been made out. The court concluded that there was some evidence introduced by the Crown on each essential element of the charge.

The court also answered the defence assertion that the Crown must prove that s. 36(4) of the *Fisheries Act* does not apply and had not done so. Based on the wording of s. 794 of the *Criminal Code* and applicable case law, the learned judge concluded that the defendant has the onus of proving an exception prescribed by law. Further, the Crown's absense of proof respecting the Water License issued to the Town of Iqualuit, a third party, was irrelevant to the non-suit application.

Held: Motion dismissed.

REASONS/MOTIF:

J. Cliffe and B. Webber, Counsel for the Crown
J. Donihee, R. Secord, D. Jenkins and P. Kennedy, Counsel for the Defence

[para1] BOURASSA J.:-- At the close of the Crown's case, the Defendant made application to dismiss the Information on the ground that the Crown had failed to call sufficient evidence on all the essential elements of the case. This is commonly known as a non-suit application and amounts to a dismissal of the charges on its merits. *Walker* v. *The King* [1939] S.C.R. 214, 71 C.C.C. 305.

[para2] According to law, my obligation is to determine whether there is any evidence, direct or indirect, upon which a jury properly instructed could convict. Reasonable doubt is not the threshold at this point -- but rather whether a prima facie case has been made out. *R.* v. *Carpenter (No. 2)*, (1982) 1 C.C.C. (3rd) 149, 31 C.R. (3rd) 261 (Ont. C.A.); *R.* v. *Morin*, [1963] 3 C.C.C. 159; *Girvin* v. *The King*, (1911), 45 S.C.R. 167.

[para3] For a prima facie case to be made out, there must be some evidence on each essential element involved in the prosecution.

[para4] The Defendant is charged with three offences contrary to Section 36 of the *Fisheries Act*. These charges followed the collapse of a sewage lagoon dyke in Iqaluit, N.W.T. June 1, 1992.

[para5] The Defendant admitted responsibility for the operation and/or ownership of the sewage lagoon at the time of the offence (transcript April 19, p. 3, line 13). On this basis, it appears that other Informations charging this Defendant and the Town of Iqaluit were withdrawn. The Town of Iqaluit was the holder of a Water License issued pursuant to the *Northern Inland Waters Act*. This license authorized the use of certain waters for municipal purposes and the discharge thereof after such use -- meeting certain requirements -- into a treatment facility. Presumably this facility was the sewage lagoon, although there is no reference to it in the Water License. At the time of the incident, a transfer of the ownership/operation of the sewage lagoon from the Defendant to the Town was being negotiated or implemented. The Town had not yet assumed responsibility for the work however.

[para6] The relevant sections of the *Fisheries Act* read as follows:

> "36 (3) Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where the deleterious substance or any other substance may enter any such water.
>
> 36 (4) No person contravenes subsection (3) by depositing or permitting the deposit in any water or place of
>
>> a) waste or pollutant of a type, in a quantity and under conditions authorized by regulations applicable to that water or place made by the Governor in council under any *Act* other than this *Act*; or

> b) a deleterious substance of a class, in a quantity or concentration and under conditions authorized by or pursuant to regulations applicable to that water or place or to any work or undertaking or class thereof, made by the Governor in Council under subsection (5)."

[para7] In this prosecution pursuant to Section 36 of the *Act*, the Crown must ultimately prove, beyond a reasonable doubt, that:

> 1) between 1 June and 10 June, 1992 2) this accused -- a person -- 3) at Iqaluit, N.W.T. 4) did unlawfully deposit or permit the deposit 5) of a deleterious substance -- sewage -- 6) in a place 7) under circumstances where the substance could or did get 8) into waters frequented by fish.

[para8] At this point the onus is proof of a prima facie case, that is to say some evidence on each is essential.

[para9] The Defendant argues that the Crown has not met the evidentiary onus upon it with respect to all the essential elements of the case that have been addressed in the evidence. In addition, the Defendant argues that there is another essential element that the Crown has missed completely: the Crown has not proved that Section 36 (4) of the *Fisheries Act* does not apply. That is to say, the Crown has not proved that the Defendant was not authorized pursuant to subsection (4).

[para10] The Defendant has cited no authorities in support of this contention.

[para11] I agree with the submissions of the Crown that Section 36 (4) is an exemption prescribed by law from the application of Section 36 (3) of the *Fisheries Act*. It seems clear that the *Act* simply provides that no offence occurs if the actus reus is legally authorized.

[para12] Section 794 of the Criminal Code, which has application to these summary conviction proceedings pursuant to the Interpretation *Act*, Section 34(2) provides that:

> "794 (1) No exception, exemption, proviso, excuse or qualification prescribed by law is required to be set out or negatived, as the case may be, in an information.
>
> (2) The burden of proving that an exception, exemption, proviso, excuse or qualification prescribed by law operates in favour of the defendant is on the defendant, and the prosecutor is not required, except by way of rebuttal, to prove that the exception, exemption, proviso, excuse or qualification does not operate in favour of the defendant, whether or not it is set out in the information."

[para13] This onus that lies upon the defendant to prove an exemption is a long understood and accepted one in law. The defendant's very argument was canvassed by the British Columbia Court of Appeal in *R.* v. *Daniels* (1990), 60 C.C.C. (3), 392, and rejected. There the Court ruled that the Crown, in a *Fisheries Act* prosecution, did not have to prove that an accused did not have a Minister's permit to take shellfish in a contaminated area.

[para14] In addition, this onus has been examined by the Supreme Court of Canada in *R.* v. *Lee's Poultry Ltd.* (1985), 17 C.C.C. (3rd) 539 in light of Section 11 (d) of the Charter of Rights and no conflict was found with the presumption of innocence.

[para15] Accordingly, there is no obligation on the Crown to prove or disprove anything about the Water License -- the exemption, exception, proviso, excuse or qualification allegedly provided by it or its relevance to the charges before me at this point in the prosecution. The Defendant may well be able to rely upon it at a later time when it presents its defence, if any.

[para16] In my view at this point the Water License, held by a third party, is irrelevant and has no application to the Defendant's motion for non-suit.

[para17] I therefore reject this defence argument.

[para18] With respect to the essential elements of the Crown's case I am satisfied that, at the close of the Crown's case, there is some evidence on all of them, including these: I have admission of operation and/or ownership of the lagoon by the Defendant; the Defendant is a person in law; the deposit occurred in Iqaluit, N.W.T. at the times set out in the Information from the Defendant's lagoon; the sewage waste was a substance deleterious to fish and that it reached the waters of Koojesse Inlet which are frequented by fish.

[para19] While there may still be room to argue the sufficiency of the evidence beyond a reasonable doubt, and some of the evidence adduced by the Crown appears vulnerable, I find that the Crown has placed some evidence before the Court on all of the essentials required and that a prima facie case has been made out.

[para20] The Defendant's application is dismissed.

NORTHWEST TERRITORIAL COURT

[Indexed as: R. v. Northwest Territories (Commissioner) #2]

Between Her Majesty the Queen as Represented by Environment Canada, and Her Majesty the Queen in Right of Canada as represented by the Commissioner of the Northwest Territories

Bourassa J.

Yellowknife, July 22, 1993

***Fisheries Act*, R.S.C. 1985, c. F-14, ss 2, 4(2)(a), 34(1), 36(3), 40(5)(a), 78.6 – whether s. 36(3) is unconstitutional for reasons of vagueness – section meets tests established by the Supreme Court of Canada – sections are not overly broad – they are detailed, comprehensive, strict and thorough – provisions reflect a substratum of values reflecting environmental protection and state punishment of polluters – standard is sufficiently detailed to delineate an area of risk**

***Canadian Charter of Rights and Freedoms, 1982*, ss 1, 7 – Vagueness – overbreadth – vagueness can arise under ss 1 and 7 – vagueness in relation to the minimal impairment test merges with overbreadth – vagueness is based on principles of fair notice and limitation of enforcement discretion – vagueness and overbreadth are two separate concepts – vagueness must be considered in the circumstances of the case**

Summary: This is an application by the defendant to strike down s. 36(3) of the *Fisheries Act* as unconstitutionally vague.

The defendant was charged with 3 counts under s. 36(3) of the *Fisheries Act* of depositing or permitting the deposit of in excess of 50,000 cubic meters of raw sewage into the waters of Koojesse Inlet, a body of water frequented by fish, following the failure of a sewage lagoon dyke.

The court set out the principles applicable to this issue based on the decision of the Supreme Court of Canada in *R.* v. *Nova Scotia Pharmaceutical Society Ltd.* and other cases. The issue of vagueness can arise under s. 7 of the *Charter of Rights and Freedoms* – it is a principle of fundamental justice that laws must not be too vague. "Vagueness" can also arise under s. 1 *in limine* on the basis that a limitation on Charter rights must be prescribed by law. A law may be so vague as not to meet this requirement. The doctrine of vagueness is founded on the rule of law, especially on principles of fair notice to citizens and limitation of enforcement discretion. Fair notice to the citizen includes both formal notice, being an acquaintance with the actual text of the statute, and substantive notice, being an understanding that some conduct comes under the law. With respect to the limitation of enforcement discretion, a law must not be so devoid of precision that a conviction automatically flows from the decision to prosecute. Precision requires an adequate basis for legal debate. Similar considerations apply to vagueness when raised under s. 7 and 1 of the *Charter*. Vagueness in relation to the minimal impairment test under s. 1 merges with the related concept of overbreadth. Vagueness and overbreadth are two separate concepts. Vagueness must be considered in the context of the circumstances of the case.

With respect to the impugned section of the *Fisheries Act*, following a review of related sections of the Act, the learned justice concluded that the provisions represent a detailed, comprehensive, "strict" and thorough legislative regime to protect the fishery which is not overly broad.

Respecting the formal notice requirement, the defendant is presumed to know the law. As to the more substantive requirement of notice to the citizen, the court found that the regulatory scheme in the Act reflects a set of values about protection of the environment and the fact that acts of pollution are punished by the state.

The court found that s. 36(3) is not a "standardless sweep" which guarantees conviction once a decision is made to prosecute: the while the standard is strict and broad, it is also detailed and comprehensive; the words in the prohibition are not in the same category as words failing the test in previous cases; and there have been both convictions and acquittals on charges under the section.

Held: Application dismissed.

REASONS/MOTIF:

J. Cliffe and B. Webber, Counsel for the Crown
J. Donihee, R. Secord, D. Jenkins and P. Kenney, Counsel for the Defence

[para1] The Defendant is on trial for three alleged contraventions of the *Fisheries Act*, R.S.C. 1985, c. F-14. The charges arise out of an incident on June 1, 1992 in Iqaluit, N.W.T. It is alleged, inter alia, that a sewage lagoon dyke, under the care and control of the Defendant, failed under foreseeable circumstances, discharging the contents of the lagoon -- raw sewage -- into Koojesse Inlet, a body of water frequented by fish.

[para2] The Defendant contests the constitutionality of Section 36(3) of the *Fisheries Act*, R.S.C. 1985, c. F-14, arguing that it offends the doctrine of vagueness in that it fails to delineate an area of risk and creates a "standardless sweep"; that it is overly broad. In addition, that it does not meet the proportionality test set out in Section 1 of the Charter of Rights and Freedoms as described in R. v. Oakes (1986) 26 D.L.R. (4th) 200. The Defendant applies to have the section struck as unconstitutionally vague.

VAGUENESS

[para3] The doctrine that the Defendant seeks to invoke "... can therefore be summed up in this proposition: a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate." *Regina* v. *Nova Scotia Pharmaceutical Society et al*, 93 D.L.R. (4th).

[para4] The impugned sections of the *Fisheries Act* read:

> "36 (3) Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any such water.
>
> (4) No person contravenes subsection (3) by depositing or permitting the deposit in any water or place of
>
> > (a) waste or pollutant of a type, in a quantity and under conditions authorized by regulations applicable to that water or place made by the Governor in Council under any *Act* other than this *Act*; or
> >
> > (b) a deleterious substance of a class, in a quantity or concentration and under conditions authorized by or pursuant to regulations applicable to that water or place or to any work or undertaking or class thereof, made by the Governor in Council under subsection (5)."

[para5] The doctrine of vagueness was considered by the Supreme Court of Canada in *R.* v. *Nova Scotia Pharmaceutical Society Ltd.* 93 D.L.R. (4th) 36. Reference should be made to the case in full. This decision represents the most comprehensive review and statement of the doctrine to date. In addition, it sets out the parameters of the doctrine and some considerations for its application.

[para6] The Supreme Court summarized its analysis of prior decisions on the issue as follows:

> "The foregoing may be summarized by way of the following propositions:
>
> 1. Vagueness can be raised under s. 7 of the Charter, since it is a principle of fundamental justice that laws may not be too vague. It can also be raised under s. 1 of the Charter in limine on the basis that an enactment is so vague as not to satisfy the requirement that a limitation on Charter rights be prescribed by law. Furthermore, vagueness is also relevant to the 'minimal impairment' stage of the Oakes test: Morgentaler, Irwin Toy, Prostitution Reference.
>
> 2. The 'doctrine of vagueness' is founded on the rule of law, particularly on the principles of fair notice to citizens and limitation of enforcement discretion: Prostitution Reference, Committee for the Commonwealth of Canada.
>
> 3. Factors to be considered in determining whether a law is too vague include (a) the need for flexibility and the interpretive role of the courts, (b) the impossibility of achieving absolute certainty, a standard of intelligibility being more appropriate and (c) the possibility that many varying judicial interpretations of a given disposition may exist and perhaps coexist. Morgentaler, Irwin Toy, Positution Reference, Taylor, Osborne.
>
> 4. Vagueness, when raised under s. 7 or under the s. 1 in limine, involves similar considerations: Prostitution Reference Committee for the Commonwealth of Canada. On the other hand, vagueness as it relates to the 'minimal impairment' branch of s. 1 merges

with the related concept of overbreadth: Committee for the Commonwealth of Canada, Osborne.

5. The court will be reluctant to find a disposition so vague as not to qualify as 'law' under s. 1 in limine, and will rather consider the scope of the disposition under the 'minimal impairment' test: Taylor, Osborne."

[para7] The court went on to consider the relationship between vagueness and overbreadth and agreed with the statement of the Ontario Court of Appeal in *R.* v. *Zundel* (1987), 35 D.L.R. (4th) 338:

> "Vagueness and overbreadth are two concepts. They can be applied separately, or they may be closely interrelated. The intended effect of a statute may be perfectly clear and thus not vague, and yet its application may be overly broad."

[para8] The Supreme Court of Canada then stated:

> "For the sake of clarity, I would prefer to reserve the term 'vagueness' for the most serious degree of vagueness, where a law is so vague as not to constitute a 'limit prescribed by law' under s. 1 in limine. The other aspect of vagueness, being an instance of overbreadth, should be considered as such."

[para9] The theoretical foundations for the doctrine of vagueness are:

A) Fair notice to the citizen. Comprised of two aspects:

1) the formal aspect of notice that is to say acquaintance with the actual text of a statute; and

2) a substantive aspect, "an understanding that some conduct comes under the law." Further described as "a subjective understanding that the law touches upon some conduct, based on the substratum of values underlying the legal enactment on the role that the legal enactment plays in the life of society. (p. 53)

B) Limitation of law enforcement discretion. "A law must not be so devoid of precision in its content that a conviction will automatically flow from the decision to prosecute." (p. 54)

C) The scope of precision. It was acknowledged and recognized by the Supreme Court that language use is an imprecise art and some generality is permissible if not inevitable. The court went on to observe that "a vague provision does not provide an adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria." (p. 57)

[para10] A number of other decisions rendered subsequent to the Pharmaceuticals case have considered the doctrine and its application. In *Canadian Pacific Limited* and *Her Majesty the*

Queen in Right of Ontario, May 19, 1993, Ont. C.A. (unreported) the court, in upholding a provision of the *Environmental Protection Act* prohibiting discharge of contaminants, stated at p. 19:

> "It has been settled by this court that when dealing whether or not a statutory provision is impermissibly vague the issue is to be determined by an examination of it in relation to the circumstances of the particular case not by an examination of the provisions in relation to an hypothetical set of different circumstances."

and further on:

> "The issue, therefore, is to decide whether in the light of the circumstances of this case, the provisions of s. 13(1)(a) are so lacking in precision that they do not give sufficient guidance for legal debate."

THE *FISHERIES ACT*

[para11] The impugned section has been in force and applied in the courts in Canada since July 15, 1970. It has undergone minimal amendment.

[para12] In considering whether or not Section 36 (3) is unconstitutionally vague, reference may be made to other portions of the *Act* that relate directly to the impugned section. These are definitions, qualifications and defences. The provisions of some enactments may stand in isolation unaffected by neighbouring sections -- such as the examination of the "public interest" basis for detention in *R.* v. *Morales*, (1993) 77 C.C.C. (3d) 91, but here the impugned section is fleshed out by those definitions, qualifications and defences and in my view they must be examined together in order to determine if the components of the doctrine of vagueness are present.

[para13] These are:

> -- Section 34(1) of the *Act* defines "deposit":
>
> > "deposit" means any discharging, spraying, releasing, throwing, dumping or placing;
>
> -- Section 40(5)(a) of the *Act* qualifies "deposit":
>
> > (a) a "deposit" as defined in subsection 34 (1) takes place whether or not any act or omission resulting in the deposit is intentional;
>
> -- Section 34(1) of the *Act* defines "deleterious substance":
>
> > 34(1) For the purposes of sections 35 to 43, "deleterious substance" means
> >
> > (a) any substance that, if added to any water, would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is

> rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water, or
>
> (b) any water that contains a substance in such quantity or concentration or that has been so treated, processed or changed, by heat or other means, from a natural state that it would, if added to any other water, degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish, or fish habitat or to the use by man of fish that frequent that water.

These words have been judicially considered.

> *Regina* v. *Macmillan Bloedel (Alberni) Ltd.* (1979) 47 C.C.C. (2d) 118 at pp. 121-122.

-- Section 34(1) of the *Act* defines "water frequented by fish" and Section 34(2) of the *Act* defines "Canadian fisheries waters":

> "water frequented by fish" means Canadian fisheries waters.
>
> "Canadian fisheries waters" means all waters in the fishing zones of Canada, all waters in the territorial sea of Canada and all internal waters of Canada.

-- Section 40(5)(b) qualifies the phrase "water frequented by fish":

> 40(5)(b) no water is "water frequented by fish", as defined in subsection 34(1), where proof is made that at all times material to the proceedings the water is not, has not been and is not likely to be frequented in fact by fish.

The phrase "water frequented by fish" has been judicially considered:

> Macmillan Bloedel (Alberni) case, supra, at p. 120.

-- Section 2 of the *Act* defines "fish":

> (a) parts of fish, (b) shellfish, crustaceans and any parts of shellfish, marine animals, and (c) the eggs, sperm, spawn, larvae, spat and juvenile stages of fish, shellfish, crustaceans and marine animals.

[para14] Section 78.6 of the *Act* provides for the defence of due diligence to an offence under the *Act*:

> "78.6 No person shall be convicted of an offence under this *Act* if the person establishes that the person
>
> a) exercised all due diligence to prevent the commission of the offence; or

> b) reasonably and honestly believed in the existence of facts that, if true, would render that person's conduct innocent."

[para15] Prosecution under this *Act* may be by summary conviction -- as is the case here -- or by indictment. In addition to fines and possible imprisonment, there are a variety of other sanctions provided for.

[para16] Section 36(3) of the *Act* has been judicially characterized by the *Supreme Court of Canada in Northwest Falling Contractors Ltd.* v. *The Queen*, (1980), 53 C.C.C. (2d) 253, in the following terms:

> "Basically, it is concerned with the deposit of deleterious substances in water frequented by fish, or in a place where the deleterious substance may enter such water ... In essence, the subsection seeks to protect fisheries by preventing substances deleterious to fish entering into waters frequented by fish."

[para17] The British Columbia Court of Appeal in *R.* v. *Macmillan Bloedel (Alberni) Ltd. (1979)*, 47 C.C.C. (2d) 118, observed that Parliament's intention, and the thrust of the section, was intentionally stricter than it could have been. That the intention was legislatively "to exclude each part of the process of degradation". (p. 122)

[para18] In my view, the sections referred to comprise a detailed, comprehensive, "strict" and thorough legislative regime to protect and preserve the fishery. I cannot find an overbreadth in approach or result.

[para19] The constitutionality of Section 36(3) of the *Fisheries Act* was considered by the Supreme Court of Canada in *Northwest Falling Contractors* v. *The Queen (1980)* 53 C.C.C. (2d) 353 and upheld -- but vagueness was not in issue at that time. It is therefore correct to state that subject to considerations of vagueness the section is constitutional.

ANALYSIS

[para20] The broad question is whether this enactment is so seriously vague as not to constitute a "limit prescribed by law". The answer is arrived at by considering the content of the concept.

Fair Notice

[para21] Section 36(3) of the *Fisheries Act* is a strict liability offence prosecuted in criminal court with criminal sanctions. It is not a civil matter. The Defendant is presumed to know the law pursuant to Section 19 of the Criminal Code.

> "Section 19 Ignorance of the law by a person who commits an offence is not an excuse for committing the offence."

[para22] In my view there is a core concept in our society that, generally, harm to the environment is wrong, deserving of punishment and properly subject to control by law. I use the

word 'environment' in its broad or public contest. The degradation of a fishery to a fisherman is no doubt a fishery matter. To the ship's Captain whose slops are degrading the fishery it may be a shipping matter. However, to the ordinary citizen it is pollution of the environment. Protection and preservation of the environment -- the prevention of pollution -- includes the protection and preservation of the fishery. The two concepts are not mutually exclusive.

[para23] The Defendant has argued at length there is a distinction to be drawn between the two. In my view, the courts have answered the matter. The *Fisheries Act* is primarily concerned with preservation and protection of the fishery. From a different perspective, it is also legislation having to do -- to some extent -- with pollution. Nothing turns on this in my view. In dealing with the notion of values with respect to pollution, following the criteria set out in the Pharmaceutical case at page 307. The following is noted:

> i) The "rules" set out in sections 34 - 42.1 of the *Act* and related case law are not as intricate as those specified for homicide.
>
> ii) Everyone has an inherent knowledge that pollution is wrong and that the protection of the aquatic and marine environment is a national concern.
>
> iii) There is a deep-rooted perception that pollution cannot be tolerated whether one comes to this perception from an ascetic, economic, moral, political, scientific or sociological stance.
>
> iv) Therefore it would be expected that pollution will be punished by the state.
>
> v) Pollution is indeed punished by the state and pollution trials and sentencing receive publicity.
>
> (Refer to Pharmaceutical case, supra, p. 307; Sault Ste. Marie case, supra, p. 374; *Regina* v. *Crown Zellerbach Canada Ltd.* (1988) 40 C.C.C. (3d) 289 at p. 315; *Her Majesty the Queen in Right of Canada et al* v. *Friends of the Oldman River Society et al* (1992) 88 D.L.R. (4th) 1, at p. 7)

[para24] To argue that this does not apply to a consideration of vagueness, specifically notice, in Section 36(3) of the *Fisheries Act* because the *Act* has to do with fisheries and not pollution, is untenable.

[para25] I reject the argument there is an absence of subjective understanding that some conduct that impacts on water and fish may be regulated. This substratum of values is reflected in the numerous statutory enactments designed to protect and conserve the natural environment found at municipal, provincial and federal levels. This core concept has been implicitly acknowledged in almost every case dealing with what I generally classify as 'environmental cases'. In using the 'environment' here, I refer to all aspects of the environment -- including pollution, fish and their habitat. It includes notably *R.* v. *Nova Scotia Pharmaceutical Society Ltd.*, *Regina* v. *Royal Pacific Sea Farms Ltd.*, *Boyle C.C.J. Co.*, *Court of Vancouver*, June 26, 1989; *R.* v. *Satellite Construction*

Ltd., (1992) C.E.L.R. (N.S.) 215; and *Regina* v. *Bata Industries Ltd.* (No. 2) (1992) 70 C.C.C. (3d) 394.

[para26] In my view, the *Fisheries Act*, Section 36(3) relates directly to elements of our society's substratum of values.

Enforcement discretion and scope of precision

[para27] Is Section 36(3) a standardless sweep? Does it practically guarantee a conviction? In my opinion, it does not. The enactment sits at an apex of numerous definitions -- standards -- refining and honing Parliament's intentions. While it has been observed that the standard is strict and broad, it is a standard that a Defendant may examine, challenge and debate. Indeed, some standards now applied in Section 36(3) prosecutions have in fact emanated from such legal debate. A review of the abridgments, texts and case law with respect to this section of the *Fisheries Act* reveals that the courts have given it a fairly constant and settled meaning over the past years, but not at the expense of foreclosing debate. The enactment is detailed and comprehensive. Even in isolation, the very words of the section set out standards: "deleterious", "deposit", "permit", "frequented by fish".

[para28] In my view, the wording of the prohibition contained in Section 36(3) cannot be placed in the same category as the words that have failed this test, such as: "Likely danger to health" -- *R.* v. *Mortentaler* (1988) 44 D.L.R. (4th) 385; "public interest" -- *R.* v. *Morales*, (1993) 77 C.C.C. (3d) 91; "undue exploitation of sex" -- *R.* v. *Butler* (1992) 70 C.C.C. (3d) 129; "any business or undertaking, commercial or otherwise" -- *Committee for Commonwealth of Canada* v. *Canada (1991)* 77 D.L.R. (4th) 358; and "hatred and contempt" -- *Canada* v. *Taylor* (1990) 70 D.L.R. (4th) 358.

[para29] There have been numerous prosecutions pursuant to Section 36(3) of the *Act* since its enactment and many convictions. Equally, there have been numerous acquittals following trials. It cannot be advanced that the Defendant has no possible way of defending himself on this charge. In my view, the impugned section sufficiently and intelligibly delineates an area of risk allowing a Defendant to recognize what to avoid, striking a fair balance between generality and specificity, between enforcement of values and the rights of an accused, leaving ample room in its language for legal debate and a mediating role for the judiciary.

[para30] The circumstances of this case consist of the failure of a sewage lagoon dyke resulting in the deposit of it in excess of 50,00 cubic meters of raw sewage into the waters of Koojesse Inlet which are frequented by fish.

[para31] The Defendant is charged with the offence of depositing or permitting the deposit of this waste. The parameters of the legal debate to follow those charges are precise, detailed and clearly set out in the Information:

> "Count 1: Between the 1st day of June, A.D. 1991 and the 10th day of June, A.D. 1991 inclusive at the Iqaluit sewage lagoon, at or near the Municipality of Iqaluit, on Baffin Island, in the Northwest Territories, did unlawfully deposit or permit the deposit of a

deleterious substance, to wit: sewage, in a place, to wit: the intertidal area of Koojesse Inlet immediately southwest of the west dyke of the Iqaluit sewage lagoon, under conditions where the said deleterious substance may enter water frequently by fish, to wit: Koojesse Inlet, in violation of Section 36(3) of the *Fisheries Act*, and did thereby commit an offence contrary to Section 40(2) of the *Fisheries Act*.

Count 2: Between the 1st day of June, A.D. 1991 and the 10th day of June, A.D. 1991 inclusive at the Iqaluit sewage lagoon, at or near the Municipality of Iqaluit, on Baffin Island, in the Northwest Territories, did unlawfully deposit or permit the deposit of a deleterious substance, to wit; sewage, in a place, to wit: the intertidal area of Koojesse Inlet immediately southwest of the west dyke of the Iqaluit sewage lagoon, under conditions where the said deleterious substance entered water frequented by fish, to wit: Koojesse Inlet, in violation of Section 36(3) of the *Fisheries Act* and did thereby commit an offence contrary to Section 40(2) of the *Fisheries Act*.

Count 3: Between the 1st day of June, A.D. 1991 and the 10th day of June, A.D. 1991 inclusive at the Iqaluit sewage lagoon, at or near the Municipality of Iqaluit, on Baffin Island, in the Northwest Territories, did unlawfully deposit or permit the deposit of a deleterious substance, to wit: sewage, in water frequented by fish, to wit: Koojesse Inlet, in violation of Section 36(3) of the *Fisheries Act* and did thereby commit an offence contrary to Section 4(2)(a) of the *Fisheries Act*.

[para32] In conclusion, I find no vagueness in Section 36 (3) of the *Fisheries Act* so as to sustain an argument under Section 7 of the Charter. I am unable to find that the enactment is so vague as to not satisfy the requirement that a Charter limitation be "prescribed by law".

[para33] The Defendant's application is dismissed.

ONTARIO COURT OF JUSTICE – PROVINCIAL DIVISION

[Indexed as: *R.* v. *Giammaria*]

Between Her Majesty The Queen, and Franco Giammaria and Frances Giammaria

Bartraw Prov. Div. J.

Ottawa, August 5, 1993

***Fisheries Act*, R.S.C. 1985, c. F-14, ss 35(1), 40(1), 79.2 – charge of carrying on work resulting in harmful alteration of fish habitat – whether sodded area constituted fish habitat – did not need to be expert to conclude that with evidence of fish on both sides and in front of sodded area, it is fish habitat – order made under s. 79.2 to restore area**

Summary: The accused was charged under s. 35(1) of the *Fisheries Act* with carrying on a work that resulted in the harmful alteration of a fish habitat. The accused admitted putting fill into the Rideau River at the back of his property. The issue raised in the case turned on whether the area which was sodded over by the accused constituted fish habitat. Evidence was introduced at trial confirming the presence of fish on both sides and in front of the new sodded area. The court concluded that one did not need to be an expert to determine that if there were fish on either side and in front of the new area, then the newly sodded area must also have been fish habitat. The accused was convicted and ordered to restore the area to its original state at his own expense.

Held: Accused guilty.

REASONS/MOTIF

L. Jeanes, Counsel for the Crown
P. Dioguardi, Counsel for the Defendants

[para1] BARTRAW PROV. DIV. J. (Orally):-- We are dealing with a charge against Franco Giammaria that is dated between the 15th of August, 1992, and the 2nd of September, 1992, in Nepean, the offence being that unlawfully did carry on work that resulted in the harmful alteration of a fish habitat, and it is under s. 35(1) of the *Fisheries Act*.

[para2] 35(1) indicates:

> "No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat."

'Fish habitat' being:

> "spawning grounds and nursery, rearing, food supply and migration areas on which fish depend directly or indirectly in order to carry out their life processes;"

[para3] The evidence we have heard today, there certainly is evidence, and it is admitted by the defence, that Mr Giammaria did put fill into the water. In fact, he has plead guilty, along with his wife, to other offences of placing fill.

[para4] He has also introduced into evidence today polaroid shots that he has taken with a line of some sort indicating that he did put fill into the water. He certainly is indicating a lot less than the amount that the Crown is alleging of fill that he has put into the water. But, in any event, he does admit putting fill into the water and he has indicated the reasons why.

[para5] There are clear photographs introduced by the Crown witnesses, I will call them the before pictures, before the work began, in Exhibit Number One, and then later in Exhibit Number 11, which show what the area looked like before the work began, including a cement wall that came out from the property next door which clearly shows water on Mr. Giammaria's side of the wall, which water extends back quite a bit further than Mr. Giammaria indicates on his polaroid pictures. He measures from the furthest point of the wall. It is clear from the photographs that at back to the base of the wall where it meets the wall on the next door property, there is water located on Mr. Giammaria's side.

[para6] We have heard evidence from Mr. Harris, the area biologist, who has given expert testimony. He indicated that he has done testing in the area, electroshock system I believe he calls it, and he has, in fact, found that there is fish on both sides of the location where this new sodded area is now located. He indicates he was unable to go and do testing right where the sodded area was located or in front of where the sodded area is located as a result of the - I believe he indicates he was sinking in the ground at that location. But he did tests on both sides of it and both sides he found that there were fish in that location.

[para7] We also have the evidence from Mr. Niblett who has also filed a report, and he also did the same type of testing and also the seining testing which is, I believe, use of a net. He was able to find fish not only on both sides as did Mr. Harris, but he was able to also do tests in front of the newly sodded area and also has located fish in that area. In fact, his report indicates that he was able to find more fish in that particular location than in the other two areas.

[para8] So certainly there is evidence that around where this new sodded area is there is fish habitat; the question being now is as to whether there was fish habitat in the actual area where this sod is now located. One only has to look at the exhibits, which I call the before exhibits, Number One, which clearly show what the area looks like prior, and also in Exhibit Number 11, that there was water in that area.

[para9] I do not think one has to be any sort of expert to show or to come to a conclusion that if there is fish habitat on both sides of this area and on the outside of the area now, that there had to have been fish habitat where the sodded area is now, unless the fish all came to an invisible wall and just stopped swimming towards that area and turned around and went back. As I indicated, you do not have to be an expert to come to a conclusion that there had to have been fish habitat in that area, just by looking at those photographs.

[para10] I am satisfied on the evidence heard before the court today that there were alterations done to the land to the back of Mr. Giammaria's property, and he admits that he did commission this work to be done.

[para11] I am further satisfied that this alteration was harmful to the fish habitat in that area, certainly to some extent. There is some indication that by this work being done that it might have been beneficial to the fish habitat also, but to what extent obviously we do not have that evidence before the court. But all the Crown has to show is that there was a harmful alteration of the fish habitat at the area in question.

[para12] I am satisfied that the Crown has, in fact, proved their case. There will be a conviction.

* * * * *

ORDER UNDER SECTION 79.2 OF THE *FISHERIES ACT*

[para13] Whereas Franco Giammaria has been convicted by this Court on the 4th day of August, 1993 of unlawfully carrying on a work that resulted in the harmful alteration of fish habitat, contrary to Subsection 35(1) of the *Fisheries Act*, R.S.C. 1985, Chapter F-14, as amended, thereby committing an offence under Subsection 40(1) of the said *Act*;

[para14] AND WHEREAS section 79.2 of the said *Act* authorizes the following Order;

THIS COURT ORDERS THAT FRANCO GIAMMARIA SHALL

1. Restore the area at the Rideau River near the address known municipally as 2075 Prince of Wales Drive, Nepean, Ontario to its original state prior to fill being placed in the Rideau Canal or to an acceptable extent as required by an engineering firm in a report and as agreed to by the Ministry of Natural Resources.

2. These works are to be completed within one year of the date of this order.

3. These works are to be carried out at Mr. Giammaria's own expense.

YUKON TERRITORIAL COURT

[Indexed as: *R.* v. *Scobey*]

Between Regina, and Maurice Arthur Scobey and Between Regina, and Charles Frederick Scobey

Faulkner Terr. Ct. J.

Whitehorse, October 18, 1993

***Fisheries Act*, R.S.C. 1985, c. F-14, ss 34(1), 35(1) – accused charged under s. 35(1) – whether creek constituted "fish habitat" – meaning of "fish habitat" must be read in conjunction with federal powers over "sea coast and inland fisheries" – Act only applies to a fishery which means fish of commercial or sporting value – potential use as a fishery is insufficient – accused discharged**

Summary: Two brothers were charged separately under s. 35(1) of the *Fisheries Act* with carrying on a work or undertaking resulting in the harmful alteration, disruption or destruction of fish habitat. The Crown proceeded by way of indictment. Both accused chose trial by Supreme Court Judge and the matter came before this court for a preliminary inquiry. Evidence for both accused was heard in one preliminary inquiry.

Both accused are gold miners. To prepare for their mining activities, they stripped approximately 1 km of a creek, eventually causing erosion from the unstable banks which seriously degraded the water quality. The creek in question was North Henderson Creek, which flows into Henderson Creek, which flows into a channel of the Stewart River just above its confluence with the Yukon River. At least one species of fish (arctic grayling) was found in the creek.

The learned trial judge focused on the question of whether the creek constitutes "fish habitat" as defined in s. 34(1) of the *Fisheries Act*. Following the B.C. Court of Appeal in *R.* v. *MacMillan Bloedel*, the court found that the Act must be interpreted within federal constitutional powers over "sea coast and inland fisheries"; it can only apply to areas where there is a fishery, meaning fish of a commercial or sporting value. Although there was evidence that the creek might be suitable as a "rearing stream" there was no evidence that it was a part of a fishery. The learned trial judge added *in obiter* that it should not be taken that the *Fisheries Act* can only apply to waters which themselves support a fishery and further that an accused may not escape conviction by arguing that the activities affected an area of little value.

Held: Charges against both accused were dismissed.

REASONS/MOTIF:

David McWhinnie, Counsel for the Crown
R.P. Marceau, Counsel for the Defence

[para1] FAULKNER TERR. CT. J.:-- The accused, Maurice Scobey, is charged with an offence contrary to s. 35(1) of the *Fisheries Act*. The Crown having proceeded by indictment, Mr. Scobey elected to be tried by Supreme Court Judge and the matter came before me for preliminary inquiry. Maurice Scobey's brother Charles faces an identical charge which, however, is contained in a separate information. By consent, the evidence relative to both was heard at one preliminary and the question of whether one or both should be committed to stand trial will be considered in this decision.

[para2] Section 35(1) of the *Fisheries Act*. R.S.C. 1985 c. F-14 provides that:

> No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.

[para3] "Fish habitat" is defined in s. 34(1) of the *Act* as:

> spawning grounds and nursery, rearing, food supply and migration areas on which fish depend directly or indirectly in order to carry out their life processes.

[para4] The Scobey brothers are gold miners. In 1990, they agreed to lease certain placer claims on North Henderson Creek. North Henderson Creek is a small stream which flows into Henderson Creek. Henderson in turn flows into a channel of the Stewart River just above that river's confluence with the Yukon River. To prepare the creek for mining, the defendants stripped about a kilometre of the creek using heavy equipment. All the dirt and vegetation were pushed to the valley sides. The operation destroyed the existing vegetated and stabilized banks of the creek and pushed material into the creek. Erosion of the now unstable banks has seriously degraded the water quality. The evidence was that at least one species of fish (arctic grayling) was found in the creek and that it's suitability for fish had been degraded by the defendants' operations. The defendants had proceeded without any licence or permission to undertake the mining operation.

[para5] If one refers to the definition of "fish habitat" in the *Fisheries Act* it would appear that the prosecution need only show that fish could or do live in the waters in question. Indeed, several *Fisheries Act* cases have decided the issue on just that basis.

[para6] In *R.* v. *West Fraser Mills Ltd.*, (1992) 10 CELR (N.S.) 124, Judge de Villiers of the British Columbia Provincial Court decided that there was ample evidence that the area in issue fit the definition of "fish habitat". The judge made this decision on the evidence that fish spawned in the creek and lived there part of their lives.

[para7] In *R.* v. *Maritime Electric Co.* (1990) 4 CELR (N.S.) 289, the P.E.I. Supreme Court considered the issue of whether the Crown must prove that the area in question acted as a spawning ground, nursery, rearing, migration and food supply area. They decided that the 'and' in the definition of fish habitat should be read disjunctively rather than conjunctively and therefore the Crown need only prove that the site provided one of the functions listed in the definition.

[para8] Chief Judge Lilles of this Court, in *R.* v. *VanBibber* [1990], Y.J. No 232, agreed with the decision of the P.E.I. Supreme Court that the word 'and' in the definition of fish habitat should be read disjunctively and not conjunctively. He goes on to say at p. 6 of the judgment:

> Therefore proof that the accused carried on an undertaking that resulted in harmful alteration to any one of the elements listed in the definition together with the proof of the existence of fish at the site is all that is necessary to constitute the offence.

[para9] The defence in this case argues, however, that "fish habitat" as used in the *Fisheries Act* must have a more restricted meaning consistent with the scope of the Federal Government's power over "fisheries". It appears well settled by the Supreme Court of Canada cases of *Fowler* v. *The Queen* [1980], 25 SCR 213 and *Northwest Fall Logging Contractors* v. *The Queen* [1980], 2 SCR 292, that while Parliament has the power to protect the environment in which fish live, this is not a general power to control water pollution. Rather, it must be shown that there is a connection between the *Fisheries Act* regulation in question and a harmful effect on fisheries, not just fish. This requirement is amply illustrated by the decision of the British Columbia Court of Appeal in *R.* v. *MacMillan Bloedel* (1984) 50 BCLR 280. In that case, the defendant's logging activities had adversely affected the habitat of a small fish found in a stream on Vancouver Island. These fish had no commercial or sports fishing value. The stream in question had a falls downstream which prevented fish in the main river system from ascending to the area in question. The Court of Appeal held that, as the *Fisheries Act* must be interpreted within the Federal Government's authority to legislate for "sea coast and inland fisheries", the *Act* could only apply to areas when there was a "fishery" which meant fish of a commercial or sporting value. The majority in MacMillan Bloedel adopted the definition of a fishery referred to in Fowler where Martland, J. said at page 223:

> The meaning of the word 'fishery' was considered by Newcombe J. in this Court in *A.G. Can.* v. *A.G.B.C.* (Reference Re *Fisheries Act*, 1914) [1928] S.C.R. 457 at 472, [1928] 4 D.L.R. 190, affirmed [1930] A.C. 111, [1219] 3 W.W.R. 449, [1930] 1 D.L.R. 194:
>
>> In Patterson on the Fishery Laws (1863) p. 1, the definition of a fishery is given as follows:
>>
>>> A Fishery is properly defined as the right of catching fish in the sea, or in a particular stream of water; and it is also frequently used to denote the locality where such right is exercised.
>>
>> In Dr. Murray's New English Dictionary, the leading definition is:
>>
>>> The business, occupation or industry of catching fish or of taking other products of the sea or rivers from the water.
>
> The above definitions were quoted and followed by Chief Justice Davey in *Mark Fishing* v. *United Fishermen & Allied Wkrs' Union* [197[illegible], 3 W.W. R. 641, 24 D.L.R. (3d) 585 at 591 and 592, affirmed [1973] 3 W.W.R. 13, 38 D.L.R. (3d) 316 (S.C.C.) Chief Justice Davey at p. 592 added the words:

> The point of Patterson's definition is the natural resource, and the right to exploit it, and the place where the resource is found and the right is exercised.

[para10] There was no evidence led at the preliminary inquiry that North Henderson Creek forms part of a "fishery". North Henderson Creek is a tributary of the Stewart River and thence of the Yukon River. The Yukon River supports a commercial, sports and subsistence salmon fishery of considerable economic, cultural and ecological value. Portions of the river system are used by salmon in different ways. Some portions, including all of the main stream, are used by salmon for migration to and from the sea. Other portions, consisting of certain of the tributaries, are spawning grounds. Still other portions are used by juvenile salmon and could be referred to as "rearing streams".

[para11] North Henderson is said to be suitable for use as a "rearing stream". There is, however, no evidence that it is presently so used. Indeed, it is probable that it is not as mining on the main fork of Henderson Creek causes its waters to be turbid, effectively forming a barrier to fish that might ascend into North Henderson. The opinion of Mr. Von Finster, a fisheries expert, was that salmon would use North Henderson if mining activity on the main fork were to cease. Attempts by Mr. Von Finster to find salmon in North Henderson produced no salmon although he did trap one grayling, as has already been stated. There was no evidence as to what part, if any, North Henderson Creek plays in the life cycle of the grayling or any other fish and no evidence of there being any sports fishery for grayling on the creek.

[para12] Thus it can be seen that there is no evidence that the North Henderson Creek forms any part of the salmon or other fishery. At best, it has this potential. Prior to the activities of the defendants, it was suitable for use by salmon. It was not being so used and likely had not been for many years inasmuch as Henderson Creek was staked by miners as long ago as the 1890's and has been mined off and on ever since. Consequently, it represents a potential part of the Yukon River salmon fishery dependent upon the happening of certain events at some unforeseeable future time. This is insufficient to constitute North Henderson Creek as "fish habitat" as that term has been interpreted by the MacMillan Bloedel case, that is to say, as a part of a fishery.

[para13] I do not take MacMillan Bloedel as holding that the *Fisheries Act* can only apply to waters which themselves support a fishery. As Martland, J. observed in Northwest Falls at p. 300:

> The power to control and regulate [the fisheries resource] must include the authority to protect all those creatures which form a part of that system.

[para14] Likewise, the power must include the authority to protect all waters which form a part of that system. It would be dangerous and naive to take too compartmentalized a view of an ecosystem. Natural processes are not perfectly understood and tampering with nature in seemingly inconsequential ways can have serious and unforeseen effects. There may be a linkage between man's activities at one site and the fish at another.

[para15] Neither should it be thought that an offender can escape by saying that his activities were carried out in an area of relatively little value. There are no unimportant streams and no expendable fish.

[para16] However, it does not fall to be decided whether the actions of the Scobey brothers caused environmental damage, or whether, in proceeding without any licence or permission, they broke the law. The question is whether they committed an offence contrary to s. 35(1) of the *Fisheries Act* as that section has been interpreted in MacMillan Bloedel. In my view, that case, although not requiring proof that the waters in question were being used as a fishery, does require that a link be shown between those waters and a fishery - even if the actual place where fish are taken is a considerable distance away. When the case presented to me is viewed in that light, I find that there is no evidence on which a jury properly instructed could return a verdict of guilty. Both accused are discharged.

NOVA SCOTIA PROVINCIAL COURT

[Indexed as: R. v. Stora Forest Industries Ltd.]

Between Her Majesty the Queen, and Stora Forest Industries Limited

Embree Prov. Ct. J.

Port Hawkesbury, August 25, 1993

***Fisheries Act*, R.S.A. 1985, c. F-14, ss 2, 34, 36(3), 36(4), 40(5)(b), 78.6 – whether waters frequented by fish can be distinguished from the waters immediately surrounding the sewer outfall – the waters surrounding the sewer outfall are too small to separate from the surrounding waters which are frequented by fish**

Defences – due diligence – defence successfully argued by accused – technology upgrade required where risks are objectively foreseeable – further evidence of due diligence included: presence of a containment device, experienced staff, regular inspection and maintenance, a company environmental awareness program, a corporate environmental policy and regular environmental publications for staff

Summary: The accused, Stora Forest Industries Limited, operated a pulp and paper plant at Point Tupper in Port Hawkesbury, Nova Scotia. On April 4, 1992, Stora began start up on Power Boiler 2 (P.B. 2) a back up or standby unit which was used about 24 times a year. P.B. 2 was checked for leaks by a Stora employee and there were none. The next morning, a second Stora employee discovered a thin stream of bunker "C" oil spraying from the discharge strainer in P.B. 2. The oil either spilled over a containment unit or sprayed over the containment unit and ended up in a sewer line which discharged its contents into the Strait of Canso. Oil was observed within a boomed area at the Strait and most of the oil was cleaned up by the same day. Some globules of oil remained on rocks at the shore and a light coating of oil was found on a 200 foot section of shore immediately south of the boomed in area. The accused was charged under s. 36(3) of the *Fisheries Act* with depositing or permitting the deposit of a deleterious substance, being bunker "C" oil in water frequented by fish, specifically, the Strait of Canso.

Most of the facts were not disputed. The defence did assert that the water immediately surrounding the sewer outfall was not in fact water frequented by fish. The court disagreed, finding that the Strait of Canso is generally water frequented by fish and that the area around the sewer outfall is too small to be separated from all the other water immediately surrounding it.

The court agreed that the accused had met the defence of due diligence and the charge was dismissed. While the technology for P.B. 2 could have been improved to contain an oil leak, given the previous reliable performance of the unit, there were no objectively forseeable risks requiring the accused to do so as evidence of due diligence. Evidence of the company's due diligence included: the containment device for small spills around P.B. 2, the company's ongoing maintenance and inspection program for its boilers, the presence of experienced staff, the company's large scale environmental awareness program, and company publications stressing environmental awareness and a 10 point environmental policy.

Held: Accused not guilty.

REASONS/MOTIF:

[para1] EMBREE PROV. CT. J.:-- Alright there are a number of matters on this morning but the first matter that I propose to deal with is to give the decision in the case of the *Queen* and *Stora Forest Industries, Mr. MacMillan and Mr. Gould.*

[para2] This was a matter that concluded on the 16th of June and decision was reserved until this morning.

[para3] Stora Forest Industries Limited is charged that on or about the 5th of April, 1992 at or near Point Tupper, County of Inverness, Province of Nova Scotia it did unlawfully deposit or permit the deposit of a deleterious substance to wit; Bunker "C" Oil, in water frequented by fish to wit; Strait of Canso, contrary to Section 36(3) of the *Fisheries Act*, R.S.C. 1985, C. F-14, as amended.

[para4] The trial lasted some three days. I heard from 13 witnesses. I was presented with 26 documentary and photographic exhibits. Most of the events of April 4th and 5th, 1992 that gave rise to this charge are not really in dispute. The following is a summary of relevant facts as I find them:

[para5] Stora Forest Industries Limited operates a pulp and paper plant at Point Tupper in Port Hawkesbury, Nova Scotia. The principle power boiler in the steam plant at that mill is Power Boiler Three...P.B. 3. It was installed in 1982 or 1983. Two other Power Boilers were referred to in evidence before me, the Recovery Boiler and Power Boiler Two or P.B. 2, which for approximately the last 10 years has been a back up or stand by unit. It is utilized in the range of... two dozen times a year. Certain occurrences in the production process at the mill made it necessary and appropriate to bring P.B. 2 on-line on April 4th. It is a three to four hour process to do that. P.B. 2 burns bunker "C" oil. The bunker "C" travels through pipes from storage tanks to the furnace. The oil is under pressure of up to 150 pounds per square inch. On its route the oil passes through an oil set where strainers are located which filter dirt from the oil. The oil set unit for P.B. 2 is pictured in Photograph one of Exhibit One at this trial.

[para6] The process of bringing P.B. 2 on-line on April 4th commenced around 10:30 p.m. and the P.B. 2 oil set began functioning at that time.

[para7] Mr. Neil Burke was the Bark and Oil Fireman who put P.B. 2 on-line between 10:30 p.m. and 1:00 a.m. on April 5th...that being 10:30 p.m. on the 4th and 1:00 a.m. on the 5th. He checked all the auxiliary equipment. "Everything was functioning alright." Mr. Burke walked by the oil set again at 4:00 or 5:00 a.m. and again around 6:00 a.m. He checked for any oil leaks among other things. He observed none. He left the area about 6:30 a.m. to take a shower.

[para8] Robert Burgess was the Supervisor in the Steam and Power Generation Section coming on duty for the day shift on April 5th. He arrived at 7:15 a.m. He did a walk around the P.B. Units and smelled oil. At 7:45 a.m. he discovered an oil leak at the P.B. 2 oil set. A thin column of bunker "C" oil was spraying from a gasket on the discharge strainer approximately two feet off the floor. He described the column of oil as being "pencil lead thickness". It was spraying about four feet in distance and sprayed oil onto some... adjacent pipes. Oil had also leaked down the side of the oil set unit. It took Mr. Burgess about 15 seconds to change the course of the oil flow and send it through a separate strainer on the same oil set. This immediately stopped the leak. Mr. Burgess said he didn't know why this gasket leaked and there's no admissible evidence before me to say why it leaked.

[para9] The oil set for P.B. 2 is surrounded by a curb four inches high covering a floor area of 208 inches by 64 inches. Its purpose is to contain small amounts of oil spilled from the oil set which was most likely to occur during maintenance or when changing strainers.

[para10] A sewer outlet existed in the floor adjacent to the curb around the P.B. oil set. The containment area inside the curb was full of bunker "C" oil when Mr. Burgess found the leak. Any oil not contained in the curb would flow into the sewer. The sewer line runs from the mill and ends up discharging its contents in the Strait of Canso. In particular, the sewer line outfall lies within an area of shoreline surrounded by a boom, the purpose of which is to retain foam generated by various mill effluents. Because of this, Mr. Burgess had a call made to personnel in another branch of mill operations called Material Handling and told them to watch the outflow at the Strait. Bunker "C" oil was observed just after 8:00 a.m. on the surface of the water within the boomed area. A triangular-shaped slick was seen measuring approximately 20 feet by 20 feet by 20 feet. Steps were immediately taken to clean up the oil. Some oil was vacuumed from the surface. Some was raked onto shore above the high water mark and removed by backhoe and dozer. The majority of the oil was out of the water by 11:00 a.m. By 4:00 p.m. everything was cleaned up that could be. Some... globules of oil continued to remain on rocks at the shore. A light coating of oil was found the next morning on a 200 foot section of shore immediately south of the boomed in area. It's possible that this oil escaped from the boom by a gap under the boom where it joins the shore. This later sighting of oil was also cleaned up.

[para11] The bunker "C" oil found in the Strait on the morning of April 5th as I described came from the leak in the P.B. 2 oil set. The oil ended up in the sewer line either when the containment unit around the oil set overflowed or when leaking oil sprayed outside the containment unit or both. It's difficult to determine with precision the amount of bunker "C" oil which ended up in the Strait of Canso.

[para12] Donald Lamorie, the Quality and Environmental Control Superintendent for Stora, estimated the amount of oil in the water at the boom site in the Strait as being 1,000 gallons.

[para13] Robert Burgess estimated the stream of oil leaking from the oil set as having a flow of one to five gallons per minute.

[para14] Depending on whether Mr. Burke last saw the oil set at 6:00 a.m. or 6:30, the time frame over which the leak existed before discovery was an hour and fifteen minutes to an hour and

forty-five minutes. At five gallons per minute and one hour and forty-five minutes, that's 525 gallons. Based on all the evidence that's before me I would consider that to be unrealistically low as an estimate of the total volume of oil which leaked. In my view, somewhere in the range of at least 500 to 1,000 gallons of bunker "C" oil went into the sewer and ended up in the waters of the Strait of Canso. Section 36(3) of the *Fisheries Act* says:

> Subject to Sub-section (4), no persons shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any such water."

The Sub-section (4) referred to therein has no application here. The terms "deleterious substance", "deposit" and "water frequented by fish" are all defined in Section 34 of the *Fisheries Act* The latter two are also referred to in Section 40, Sub (5). The term "fish" is defined in Section 2 of the *Act*.

[para15] The Crown bears the burden of proving all of the elements of the offence charged under Section 36(3) beyond a reasonable doubt. One of the elements of any offence is the identity of the accused. Here the accused is alleged to be a corporation. The normal way of establishing in Court that a corporate entity exists and what it is called is to tender a certified copy of the Certificate of Incorporation. Not infrequently counsel for a corporate accused admits existence of the corporation charged. Neither of these things has happened here. However, based on the testimony of a number of management employees and the testimony of Mr. Hall, who identified himself as President and General Manager of Stora Forest Industries Limited, and all the documentary evidence referring to such a corporate body, I'm satisfied that its existence has been established and that it has been sufficiently identified as the accused.

[para16] While all elements of this offence are in issue, defence counsel has focused its submission on two particular... aspects. In one of his submissions counsel for the accused argues, while conceding the Strait of Canso generally to be Canadian fisheries waters, that the water immediately surrounding the sewer outfall where the oil ended up is not frequented, in fact, by fish.

[para17] By operation of Section 40 (5)(b), Mr. Gould asked me to conclude that an acquittal should result because this essential element of the offence has not been satisfied. Mr. Gould also referred me to a number of sources for a definition of "frequent", both in its adjectival and verb form.

[para18] Based on the evidence before me and the applicable provisions of the *Fisheries Act*, it's clear to me that the water into which the bunker "C" oil flowed on April 5th, 1992 is water frequented to by fish as meant in Section 36(3). The Strait of Canso generally is water frequented by fish. It is inappropriate for me to consider one small portion of the Strait waters and arbitrarily isolate it from the surrounding water. I accept that the area of water immediately adjacent to the sewer outfall where the oil came from was devoid of most fish life on April 13th, 1993 and most likely was in April of 1992 as well. The accused has been discharging effluents into the Strait in this area for years. I cannot say "devoid of all fish life" as at least three examples of fish life were present in the wharf area on April 13th, 1993. Within several hundred meters of the sewer outfall more fish were found to exist by both expert witnesses who examined the area.

[para19] The proof required under Section 40(5)(b) that the relevant water here is not water frequented by fish is not present. The water contained within the... boom area around the sewer outfall is too small an area to be isolated or separated from all the other water immediately surrounding it. The water which happened to be within the boomed area on April 5th, 1992 is not "the water" in Section 40(5)(b) or Section 36 (3) but only one small portion of it which, on the facts here, cannot be divided from the rest of it.

[para20] I was told about the nature of bunker "C" oil and how it would react in the water by Mr. Doe. I accept his testimony. That evidence, the tidal nature of this water, the fact that fish were actually found within the boomed area, albeit a year afterwards, the fact that more abundant fish life occurs close by and all the other relevant circumstances all played a role in my conclusion that Section 40(5)(b) does not support the result urged on me by defence counsel. I may also say that I agree with the conclusion reached by the British Columbia Court of Appeal when dealing with a similar issue in similar circumstances in the case of *R.* versus *MacMillan Bloedel (Alberni) - Limited.* I'm also satisfied based on all the evidence that the bunker "C" oil here is a deleterious substance and that the accused did deposit that oil in water, namely, waters of the Strait of Canso.

[para21] Having already found that this water is water frequented by fish, then all of the elements of the prohibited act set out in 36 (3) have been established as have all of the elements of the specific breach of that Section charged here. Section 36 (3) creates a strict liability offence. Through the common law and pursuant to Section 78.6 of the *Fisheries Act* the accused has open to it the defence of due diligence and that was the topic of the other main thrust of... defence submissions here. Section 78.6 of the *Fisheries Act* says:

> "no person shall be convicted of an offence under this *Act* if the person establishes that the person (a) exercised all due diligence to prevent the commission of the offence or, (b) reasonably and honestly believe in the existence of facts that if true would render the person's conduct innocent."

The Supreme Court of Canada briefly described strict liability offences and the defence of due diligence in *The Queen* v. *Sault Ste. Marie* as follows and I'm quoting here from the Criminal reports, third series, volume three edition of the Sault Ste. Marie decision at pages 53 and 54. The Supreme Court describes strict liability offences as follows:

> "Offences in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act prima facie imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event."

I'm called upon to assess whether the accused has established on a balance of probabilities that it took all reasonable care, that it took all reasonable steps to avoid the discharging of this oil into the Strait.

[para22] In considering whether the prior actions of the accused constitute these reasonable steps, it's relevant for the Court to consider the issue of foreseeability.... The accused must prepare for risks which are objectively foreseeable. Here this would include risks which a reasonably thoughtful person could have foreseen might flow from the operation of everything associated with P.B. 2. The accused is supposed to prepare for foreseeable risks by establishing an effective system or method of operation for preventing their occurrence and then take reasonable steps to ensure that the system or method is properly employed.

[para23] P.B. 2 has been in operation at the Stora plant in its present form, if not its present function, for over 20 years. The oil set has been the same over that time. Several employees familiar with P.B. 2 testified that no leakage of this quantity of oil has ever happened before; in fact nothing more than a few gallons has ever been observed in the containment area around the oil set. Any such spillage that did occur was normally associated with removing a strainer from the oil set for cleaning. Absorbent materials are readily available in such an event and the oil is cleaned up.

[para24] P.B. 3 is approximately 10 years old and is the newest boiler. The P.B. 3 oil set is contained within a small room. It is a precaution designed to contain any oil leak. No leak requiring such containment has ever occurred.The P.B. 3 oil set enclosure was described as "state of the art" for the time when the boiler was installed. Several management personnel at Stora had considered in a general way housing P.B. 2 in a similar containment room. Superficial consideration was all this notion ever got. Apparently no one ever made a serious proposal that this be done. The reason advanced for not pursuing this was that the... need was not perceived to be there. P.B. 2 oil set had never been a problem and no basis apparently existed to anticipate it might become one.

[para25] Technology is advancing all the time. Change for change sake is unnecessary and in a business sense possibly wasteful. If old technology is shown to be potentially hazardous, and something better is available in the context we're dealing with here, then a manufacturer leaves old technology in place at its peril. If it fails and some prohibited act occurs it would be hard to establish due diligence. But failure to replace old technology with new is not necessarily evidence of negligence or lack of due diligence. A manufacturer and a Court has to look at what the potential risks of continuing to use...uh...excuse me...a manufacturer and a Court has to look at what the potential risks were of continuing to use older technology. If there are none, then continued use could be quite acceptable. If objectively foreseeable risks were present, which newer technology could have addressed, then the fact that the new technology is costly to install will not save a manufacturer from being found culpable if some prohibited act occurs.

[para26] So what does all of this mean in the circumstances here?

[para27] The P.B. 2 oil set has had a history of functioning reliably and without leaking oil unexpectedly. Any minor leaks were easily contained and cleaned up and occurred at predictable times. Even the limited containment curb around the unit had never been close to full of leaked oil prior to April 5th, 1992. It is my view that the failure of Stora to build a larger containment unit around the P.B. 2 oil set is not and was not evidence... of any lack of due diligence on its part.

[para28] Stora has a regular ongoing maintenance program for all its boilers including P.B. 2. Some $300,000.00 was spent in 1992 for maintenance on P.B. 2 alone. P.B. 2 is required to be

inspected by government inspectors. P.B. 2 is subject to regular inspections by Stora employees and I interpret this to mean all parts of P.B. 2.

[para29] It was required procedure for the strainers on the P.B. 2 oil set to be changed once a week. I assume this was when P.B. 2 was functioning. This was done by diverting the oil through another strainer on the other side of the oil set. The initial strainer is then cleaned. A visual inspection of the gasket is usually done at this time.

[para30] To bring P.B. 2 on-line requires manual work by a bark and oil fireman. It's just not a matter of pushing a button. A fireman was working in the area of the boiler and Neil Burke was that fireman on April 4th and 5th, 1992. He checked everything. P.B. 2 was functioning fine. He saw no oil leaks. He's instructed to check for leaks. Even prior to April 5th, 1992 firemen were supposed to inspect functioning P.B. 2 units routinely in the range of every two to four hours I was told. Oil pressure in the pipes leading to the boilers is monitored through a control room; however one witness said that a leak this size would not likely register in the control room as a drop in pressure.

[para31] Robert Burgess, the Supervisor who found tne leak, had been employed by Stora for 27 years. He knew the equipment, knew what to do to stop the leak and did so immediately. He'd been instructed what to do in the event of any oil spill and he did that.

[para32] Virtually all the employees of Stora, including...Neil Burke and Robert Burgess, were part of a large scale environmental awareness program in 1990 sponsored by Stora. Regular publications produced by Stora go to all employees by mail stressing environmental concerns. A 10 point environmental policy exists which is prominently posted at Stora's mill. Stora, through its management, has given environment concerns a high profile in its operations and has attempted to convey to its employees the need for them to act with those concerns in mind.

[para33] Based on all of the evidence before me I find that the defence of due diligence has been made out. Nothing in the history of the operation of P.B. 2 or P.B. 3 would indicate that a leak like this one on April 5th was objectively foreseeable. One can operate on the principle that anything man-made can fail but that by itself creates a notion of risk that is too remote to be classified as objectively foreseeable.

[para34] Stora has taken reasonable steps, given the nature of this power boiler equipment, to ensure that it doesn't fail. There is regular maintenance. There are regular inspections. There is most likely a relationship between the past proven reliability of the oil set on P.B. 2 and the level of care it has received. The prohibited act here is not that of just allowing the initial leak. It is depositing the bunker "C" oil into the Strait of Canso. That is what the due diligence must ultimately be directed to.

[para35] Taking reasonable steps to prevent the P.B. 2 oil set from leaking this oil is certainly part of what I must consider. Beyond that I have considered Stora's efforts to prevent any such oil leak that might occur from ending up in the Strait. P.B. 2 has an employee in the vicinity while it's functioning who is regularly to check for oil leaks. Stora has... attempted to sensitize its employees to the need for being concerned about avoidable damage to the environment. It has a plan to be

followed by Mr. Burgess and others when an oil leak is found. There's a containment area for small spills around the P.B. 2 oil set which is all that has ever been needed in the past.

[para36] The subsequent building of a larger containment unit around P.B. 2 oil set would seem to be a reasonable course based on the events of April 5th but what constitutes reasonable care must be based on what is known at the relevant time.

[para37] Having found that the accused acted with all due diligence to prevent the occurrence of this offence it follows that Stora Forest Industries Limited is not guilty of this charge.

NORTHWEST TERRITORIAL COURT

[Indexed as: R. v. Northwest Territories (Commissioner) #3]

Between Her Majesty the Queen in Right of Canada as represented by Environment Canada, and Her Majesty the Queen in Right of Canada as represented by the Commissioner of the Northwest Territories

Bourassa J.

Yellowknife, August 27, 1993

***Fisheries Act*, R.S.C. 1985, c. F-14, ss 36(3), 40(2) – defendant charged with 3 counts under s. 36 – sewage lagoon failure released sewage into Koojesse Inlet – defendant's failure to operate lagoon constituted "permitting" – raw sewage is deleterious to fish – defendant convicted on third count**

Defences – due diligence – defendant did not follow departmental guidelines

Defences – act of third parties – defendant knew of third party's plans and did nothing – defendant cannot use third party failure as shield

Defences – Act of God – spring runoff and flooding was foreseeable

Defences – officially induced error – water license was issued to municipality not the defendant – license required compliance with federal and territorial law

Summary: The defendant was charged with 3 counts under s. 36 of the *Fisheries Act* arising from the washout of the defendant's sewage lagoon in Iqualuit, resulting in the discharge of 56,000 cubic meters of waste into Koojesse Inlet. The court found that the Crown proved each element of the offence.

The defendant admitted its ownership of the sewage lagoon in Iqualuit although there was confusion as to who was responsible for the lagoon. The learned judge found that the defendant "permitted" the deposit of sewage. The defendant had actual knowledge of prior problems with the lagoon, even though it had no employees responsible for the construction, operation and maintenance of the lagoon. The defendant was aware of a construction project adjacent to the lagoon that would affect the watershed and did nothing. A drainage ditch constructed after a previous dyke failure was not maintained. Once the dyke failed, municipal officials effected some repairs. Nevertheless, there was continued seepage of about 7,200 gallons of sewage per day.

The learned judge found that raw sewage constitutes a deleterious substance based on evidence of bioassay results in this case and similar findings in a previous case. Evidence was sufficient to prove both that the sewage entered Koojesse Inlet and that the Inlet was water frequented by fish.

The learned judge rejected the 4 defences raised by the defendant. One, the defendant did not prove that it took reasonable care to prevent the commission of the offence. Based on the defendant's own guidelines for the planning, design, operation and maintenance of wastewater lagoon systems in the Northwest Territories, there was no evidence that the guidelines for the operation and maintenance of the lagoon were followed. Two, the failure of the lagoon was not caused by the acts of third parties whose construction activities contributed to the event. The defendant knew of the project details at least one year in advance and did nothing. Three, the event was not, the court found, the result of an Act of God. Although temperatures were unusually high on the day the event occurred, the problem of spring runoff and flooding was foreseeable. Four, the water license held by the municipality under the *Northern Inland Waters Act* did not provide the defendant with the defense of officially induced error. The license was issued to the municipality, not the defendant, and in any event, its terms specified that it was subject to compliance with other federal and territorial legislation.

Held: The defendant was convicted.

REASONS/MOTIF:

J. Cliffe and B. Webber, Counsel for the Crown
J., Donihee, R. Secord, D. Jenkins and P. Kennedy, Counsel for the Defence

[para1] BOURASSA J.:-- The Defendant is charged with three offences contrary to Section 36 of the *Fisheries Act*. These charges follow the washout of the Defendant's sewage lagoon in Iqaluit, Northwest Territories, and the alleged resultant discharge of sewage into the waters of Koojesse Inlet. The charges read:

> Count 1: Between the 1st day of June, A.D. 1991 and the 10th day of June, A.D. 1991 inclusive at the Iqaluit sewage lagoon, at or near the Municipality of Iqaluit, on Baffin Island, in the Northwest Territories, did unlawfully deposit or permit the deposit of a deleterious substance, to wit: sewage, in a place, to wit: the intertidal area of Koojesse Inlet immediately southwest of the west dyke of the Iqaluit sewage lagoon, under conditions where the said deleterious substance may enter water frequented by fish, to wit: Koojesse Inlet, in violation of Section 36 (3) of the *Fisheries Act* and did thereby commit an offence contrary to Section 40 (2) of the *Fisheries Act*.
>
> Count 2: Between the 1st day of June, A.D. 1991 and the 10th day of June, A.D. 1991 inclusive at the Iqaluit sewage lagoon, at or near the Municipality of Iqaluit, on Baffin Island, in the Northwest Territories, did unlawfully deposit or permit the deposit of a deleterious substance, to wit: sewage, in a place, to wit: the intertidal area of Koojesse Inlet immediately southwest of the west dyke of the Iqaluit sewage lagoon, under conditions where the said deleterious substance entered water frequented by fish, to wit: Koojesse Inlet, in violation of Section 36 (3) of the *Fisheries Act* and did thereby commit an offence contrary to Section 40 (2) of the *Fisheries Act*.
>
> Count 3: Between the 1st day of June, A.D. 1991 and the 10th day of June, inclusive at the Iqaluit sewage lagoon, at or near the Municipality of Iqaluit, on Baffin Island, in the

> Northwest Territories, did unlawfully deposit or permit the deposit of a deleterious substance, to wit: sewage, in water frequented by fish, to wit: Koojesse Inlet, in violation of Section 36 (3) of the *Fisheries Act* and did thereby commit an offence contrary to Section 40 (2) (a) of the *Fisheries Act*.

[para2] In determining the factual issues herein, I have, of course, relied upon the evidence, in particular Exhibit 26 as it relates to the construction, maintenance and operation of sewage lagoons. The viva voce evidence given by all witnesses, with one exception, was notable for its candour and honesty; the evidence of the Defendant's employee in charge of the Department of Public Works in Iqaluit was coloured. I admitted some hearsay evidence to avoid a totally mechanistic approach to the events. I attributed such weight as I felt appropriate to that evidence. I thank counsel for their effort and vigorous advocacy.

[para3] In broad terms I have to answer two questions: 1) Has the Crown proven its case beyond a reasonable doubt and if so, 2) Has the Defendant established any defence?

[para4] I answer the first question in the affirmative. These are my reasons.

[para5] Section 36 *Fisheries Act* prosecutions involve proof of a particular *actus reus*. Section 36 can be broken down into a number of constituent elements which the Crown must prove. I address those elements with respect to Count 3.

THE DEFENDANT:

[para6] At the beginning of the prosecution, both the Defendant and the Municipality of Iqaliut were named on the Information. At the opening of the trial the Defendant, through its counsel, acknowledged its "responsibility" for the sewage lagoon. In response to this the Crown withdrew the charges against the Municipality. This responsibility was reaffirmed during the trial by counsel for the Defendant. I understand the admission of responsibility in the context and the circumstances in which it was stated, i.e., an acknowledgement that the Defendant was the owner/operator of the lagoon and therefore responsible in law for any default found by this court. This point has to be made because at a later time during the trial the Defendant attempted to distance itself from that acknowledgement.

[para7] I find, on the evidence, that the Defendant was the owner and operator of the sewage lagoon. It was desirous of transferring its responsibility for the lagoon to the Municipality of Iqaluit and to that end had entered into an agreement with the Municipality. A number of witnesses spoke of this transfer agreement. It is clear that the Municipality was a reluctant party and, at the time in question, had not yet accepted such responsibility. The Municipality wanted a lengthy phase-in in order to hire, train and prepare staff and allocate resources for the obligations that would arise with the responsibility. That agreement, presumably setting out the rights, liabilities, and responsibilities of the two parties with respect to the operation and maintenance of the lagoon, in the sole control of the Defendant, was not tendered in evidence.

[para8] The evidence discloses that there was confusion and uncertainty on the part of the Municipal employees and the Defendant's employees located in that community, as to who was

responsible for exactly what with respect to the lagoon. On the evidence, no one was in charge. The Municipal employees working in the field were left in a state of ignorance. I find that there was no person actually responsible. The Defendant's supervision and control existed on paper only.

[para9] Later in the trial, the Defendant argued that the Municipality, in the maintenance and repair of the lagoon following the washout, was an independent contractor which absolved the Defendant of its responsibility for any delict arising therefrom. The facts do not support this argument and I reject it.

THE CHARGE:

> 1. Between the 1st day of June, 1991 and the 10th day of June, 1991 inclusive, at the Iqaluit sewage lagoon, at or near the Municipality of Iqaluit on Baffin Island, in the Northwest Territories...

[para10] There is no issue with respect to these elements.

THE CHARGE (continued)

> 2. ...did unlawfully deposit or permit the deposit..

[para11] In discussing the principles to be applied in determining the *actus reus* of permitting, discharging or causing pollution, Mr. Justice Dickson stated in *R.* v. *City of Sault Ste Marie*:

> The prohibited act would, in my opinion, be committed by those who undertake the collection and disposal of garbage, who are in a position to exercise continued control of this activity and prevent the pollution from occurring, but fail to do so. The "discharging" aspect of the offences centres on the direct acts of pollution. The "causing" aspect centres on the defendant's active undertaking of something which results in pollution. The "permitting" aspect of the offence centres on the defendant's passive lack of interference or, in other words, its failure to prevent an occurrence which it ought to have foreseen.

[para12] This sewage lagoon is located in a depression bounded by elevated ground on three sides. It is located a few hundred meters from the town site, a short distance from the tidal waters of Koojesse Inlet. The sewage is contained by the existing hills and two dykes; the main one known as the west dyke. The lagoon is in a natural drainage basin for a large surrounding area. It holds approximately 56,000 cubic meters of municipal waste when full.

[para13] This lagoon has been problematic in the past. The evidence in chief is that the west dyke failed on at least two prior occasions. On one occasion, a high tide washed out the west dyke; on another, in 1987, spring runoff flooded the lagoon and the same west dyke failed. It was at that time that a small diversion ditch was dug to attempt to direct some of the runoff away from the lagoon, which was the natural place for it to go. In cross-examination of Crown witnesses, it was further revealed that this same west dyke had failed a total of five times in the past ten years.

[para14] Based on the evidence before me, I fix the Defendant with constructive and actual notice of the construction, operational and maintenance needs involved in the operation of sewage lagoons. The facts indicate that the Defendant had actual notice of these needs, in particular, of the problems of spring runoff and snowmelt.

[para15] I find that the Defendant had no personnel actually and effectively in charge responsible for the supervision, operation, and maintenance of the lagoon. One Municipal employee conducted a drive-by five days per week and if everything looked OK that was precisely what he reported ... "OK". Another Municipal employee, concerned about the state of the lagoon that very spring. increased this surveillance, on his own initiative, by conducting a drive-by on weekends. The reports were simply filed. For this purpose only he was somehow deemed an employee of the Defendant. Some Municipal employees were concerned about the lagoon site, but had no authority, direction or responsibility. Municipal employees, aware of the potential problems with the sewage lagoon and out of simple concern, had requested manuals, guidelines and instructions from the Defendant on a number of occasions. They received none. Those employees had concerns about spring runoff; they had concerns about the high level of waste in the lagoon before the washout, but the Defendant was not there to listen.

[para16] The diversion ditch that was dug in 1987 was not maintained. At the time of the washout it was shallow and unable to handle the runoff where it made a right angle turn.

[para17] Earlier in the year, a major construction project was commenced on the lands adjacent to the sewage lagoon and on the lagoon's water shed. This work was the construction of the Forward Operating Location undertaken by the Department of National Defence. By any scale, it was a major undertaking and the work was visible to anyone who looked. It involved construction of barracks, hangars, roads and taxi-ways. These works were carried out at a location close to and uphill of the sewage lagoon. The project included replacing a number of nearby drainage culverts, increasing their capacity and altering the topography. The project works affected the watershed such that it would possibly allow for an increased flow of water downhill to the lagoon. In my view, this major construction project would have alerted any reasonable observer to the possibility of an effect on the drainage patterns in the area and the nearby lagoon.

[para18] This work had been outlined, discussed and described in a planning meeting between the contractor, Municipal officials and the Defendant's representatives months in advance of construction. The Defendant's agents and employees knew the work was being undertaken and, in fact, was done. The project was known to all, yet this did not generate any watchfulness, vigilance, concern, or action by the Defendant. No inspections were undertaken. No risk assessments were made. On the evidence, the only concern voiced by the Defendant as a result of this knowledge was one of access to its nearby furniture warehouse.

[para19] The drainage ditch that would bear the increased flow of spring runoff remained in the state it was.

[para20] On June 1, 1991, it was unusually warm in Iqaluit. What experience taught, engineering studies described, and any person could foresee, happened: runoff - snowmelt - overran the drainage ditch at the right angle turn. The lagoon was already overfull -- ice and

sewage levels had reached the top of the west dyke -- the lagoon overflowed at the dyke. The dyke failed and the entire contents of the lagoon washed out - - 56,000 cubic meters or more of waste.

[para21] Following the washout, the lagoon was hastily repaired by Municipal officials who had to act in default. The Defendant was simply not present in any meaningful way at the site. It did not direct, supervise or participate in the repairs. It was not repaired in a manner that was even close to the Defendant's own guidelines for the construction of such lagoon dykes. As a result, there was significant seepage of raw sewage estimated by one observer at 5 gallons per minute or 7,200 gallons per day.

[para22] In these circumstances, I find that the Defendant permitted the deposit as set out in the Information.

THE CHARGE (continued)

3. ...of a deleterious substance, to wit: sewage ...

[para23] Is raw, untreated sewage a substance deleterious to fish? Specifically, was this effluent deleterious to fish?

[para24] Raw sewage is referred to in a number of exhibits in negative terms insofar as human, animal, and fish are concerned. From Exhibit 26, it is clear that sewage is a public health concern that demands the creation of some kind of proper functioning treatment, including the prevention of spills and seepage.

[para25] The Defendant's own agents, including the Deputy Minister, described the waste in Exhibit 33, a letter to the Government of Canada, Environmental Protection Service. With respect to the Iqaluit lagoon, it states:

> ...Nor were we willing to undertake this considerable expense (regular sampling of the effluent) knowing that the treated waste water discharged from a cold temperature lagoon as toxic... (my emphasis)

[para26] The problematic aspect of untreated sewage in proximity to people and animals in the N.W.T. was discussed in *Health of our Oceans*, a March, 1991 publication of the Marine Environmental Quality Group, Conservation and Protection of Environment Canada as follows:

> Municipal Effluent:
>
> Municipal use of the marine environment is restricted to discharges of untreated or primary-treated sewage into coastal waters. Seven communities collect liquid sewage and transfer it to holding ponds or lagoons. Two communities, Resolute and Rankin Inlet, discharge liquid sewage directly into the ocean through outfall pipes (Cameron et al., 1982a, b; Dusseault and Elkin, 1983a, b). Therefore, sewage effluents enter marine waters directly, or by percolation through lagoon substrates and leaching into surface drainage systems. Communities on open coasts may discharge raw sewage directly onto the shoreline. At

> present, there is no completed chemical analysis of treated or untreated sewage from coastal Arctic communities although preliminary assessments are under way (Stanley and Associates and Dobrocky Seatech, 1987). A public health concern may exist at communities which harvest shellfish from contaminated waters or butcher marine mammals on contaminated shorelines. At present, however, the possible relationship between sewage disposal practices, consumption of contaminated meats, and the incidence of enteric diseases in Arctic peoples is unknown.
>
> A community dump (West 40) in Iqaluit, although primarily used for domestic waste, has been known to be a disposal site for industrial chemicals. During the spring snow melt, runoff from this site enters Frobisher Bay. There have been several aviation fuel spills in a watershed that runs through another dump site in Iqaluit (North 40) and drains into Frobisher Bay. Inorganic and mixed organic compounds may have contaminated the Apex dump site. Runoff from this site drains into Tarr Inlet.

[para27] Further on at page 72, dealing specifically with fish and shell fish, the report states:

> Important fish and shellfish species in the Arctic include broad whitefish, arctic cisco, least cisco, arctic char, lake fish, arctic cod, pacific herring, polar cod, capelin, clams, and scallops. Anadromous fish species, particularly arctic char and whitefish, are a very valuable resource. Environmental threats to both marine and anadromous species, described in Table 4.5, include destruction of bottom habitat (by dredging or drilling waste discharges) and bioaccumulation of contaminants in fish tissue. Fish that live close to or in contact with marine sediments and feed on benthic infauna and epifauna are particularly vulnerable to these threats.
>
> Chronic water quality problems may exist near coastal communities discharging raw or primary-treated sewage into estuaries and fjords. Residents of most eastern Arctic communities harvest shellfish in near shore waters. The potential for shellfish contamination with pathogenic organisms exists in these coastal communities, although the correlation between the incidence of human disease and sewage disposal practices is not known (Sackmann et al., in preparation). During high tide near the community of Iqaluit, Baffin Island, the potential for flooding of the sewage lagoon with runoff into Frobisher Bay is quite high (S. Heinze-Milne, pers. comm.). Bacteriological studies near the Pangnirtung, Baffin Island, dump site showed that clams in the area had high faecal coliform counts Coleman et al., unpubl. data).

[para28] The Defendant argues that municipal waste is comprised of a naturally occurring, biodegradable material and perforce, cannot be deleterious -- or I take it -- if it is, it must form an exception to the definition of "deleterious" because of its very characteristics as a naturally occurring product. The analogy was drawn to the thousands, if not tens of thousands, of caribou that roam the Arctic leaving deposits with no adverse effects on man animal or fish. This argument is untenable. Caribou do not live in towns and use lagoons.

[para29] There have been decisions by other courts that have held raw, untreated sewage to be "deleterious" as contemplated by the *Fisheries Act* s. 36 (3) most notably *R.* v. *The Corporation of*

the District of North Vancouver, a decision of the B.C. Court of Appeal reported (1982) 11 C.E.L.R. 158. At all levels, trial and appeal, the finding that raw municipal sewage was deleterious to fish was sustained.

[para30] The lagoon held raw untreated sewage. Moreover, this sewage was under ice cover and had been for the whole winter -- approximately 7 to 8 months. In these circumstances, the degradation of the sewage is minimal according to the authors of Exhibit 26. The seepage that was examined by witnesses, shortly after the failure and subsequent repair, was noted to be greyish-green. According to Exhibit 26 a grey colour is consistent with an anaerobic lagoon performing very badly. Again, according to the authors of Exhibit 26, this is a common problem with cold temperature storage lagoons. I have evidence before me that prior to the washout of the dyke, the lagoon level was up to the top of the west dyke.

[para31] I have no evidence that would suggest that the lagoon had been cleaned out, drained, or otherwise tampered with by officials at any time in the year preceding which would reduce, or affect, its toxicity.

[para32] The evidence indicates that samples of the effluent seeping from the repaired dyke were taken on June 9 and 10, 1991. These samples were taken to be utilized in a bioassay procedure. That is to say, fish were introduced to various concentrations of the sampled effluent and observations are made with respect to their vitality.

[para33] The Defendant argues that the effluent sampling procedures were defective in a number of respects and, therefore, suspect. This argument is based only upon the fact that certain protocols were not followed to the letter.

[para34] For example, the protocol states that samples should be collected in a sterile container, and maintained in a cool or refrigerated environment and utilized quickly. The sampled effluent was stored in new 5 gallon plastic "jerry cans". These cans were not sterilized, the samples were not refrigerated; we do not know if they froze. A number a days passed before they arrived in Edmonton for use in the bioassay procedure.

[para35] However, I have no evidence that would suggest that the alleged failures in any way affect the ultimate results. Additionally, "protocol" does not represent a rigid formula. As I understand the word, in this context, it is a "preliminary draft or memorandum" from its root in Greek for the first sheet of a papyrus roll with the date of manufacture, and the word for glue or glue together.

[para36] Exhibit 19, The Field Procedures for Water Quality Sampling, commences with the preamble:

> This document is intended as a reference manual to promote uniformity in water quality field procedures within the Western Region and to assist with the initial training and orientation of new staff members. It outlines the present state of field methods practised. However, due to variations in hydrological or environmental conditions and changes to program design, adaptations may be required. (my emphasis)

[para37] Finally, I have the evidence of Mr. Sackmann who stated that the delay and the possibility of elevated temperatures would have worked to the benefit of the Defendant in reducing the coliform count of the samples.

[para38] Similarly, defense argues that the bioassays were not conducted exactly according to protocol, (in this case Exhibit 21, Biological Test Method: Reference Method to Determine Acute Lethality of Effluents to Rainbow Trout) and therefore, are suspect. Alleged failures include: a) that there is no evidence the test fish were not fed within 24 hour pre-test period; b) that the biologist involved ran an unplanned, unsanctioned additional test; and c) that not enough concentrations were prepared for testing.

[para39] I can find nothing on the evidence that compromises the bioassay results. The alleged failures, if they are such, do not impact on the actual results obtained by the biologist, an expert in her field. Any departures from norm were inconsequential and of no import. She applied her expertise and made definite and certain scientific findings: all of the fish placed in a 100% solution of the effluent died within 3 hours. At a calculated dilution of 31.4%, 50% of the fish would die. This finding came as no surprise to Mr. Nickel, an expert biologist with extensive experience in the field. He testified about the effect of raw sewage on fish generally. In response to questions about bioassay testing of fish in sewage, he confirmed the efficacy of such testing and stated that he was not surprised with the results of the testing in this case. In his opinion it simply confirmed what everyone knew, "sewage kills fish".

[para40] Therefore, in light of the above, and in light of the fact that I have no evidence -- in direct or cross -- that would even suggest that the minor departures from the protocols would in any way compromise the sampling results, I am satisfied beyond a reasonable doubt that the samples were properly taken and the results gained from them accurately reflect what they purported to measure.

[para41] I am satisfied, beyond a reasonable doubt that the contents on the Iqaluit sewage lagoon - raw, untreated sewage - immediately prior to the washout on June 1 and continuing to June 10 were deleterious to fish.

THE CHARGE (continued)

4. ... in water ... to wit: Koojesse Inlet ...

[para42] Where did more than 56,000 cubic meters of waste go when the west dyke failed? The Defendant argues that there is no direct proof that the sewage actually entered the waters of Koojesse Inlet. No one saw where it went. I agree. However, I have no difficulty in concluding what occurred. The view shown in Exhibit 32, a photo montage of the area, places me at the site. The sewage flowed down a patently obvious drainage course, from the lagoon into the waters of Koojesse Inlet a mere 1 or 2 hundred meters distant. The same course is described as a "discharge stream" in Exhibit 34, a draft of the Operations and Maintenance Manual for the lagoon prepared by the Defendant. This drainage course is in the area that is flooded at high tide; indeed some high tides lap at the base of the west dyke. That the sewage ran out over the shore ice, flowed into crevices in that ice and was not in evidence when the ice melted does not persuade me that the

sewage somehow did not flow into those waters. I find that the sewage entered the waters as alleged. Those waters are waters as defined in the *Fisheries Act*.

THE CHARGE (contiued)

5. ... frequented by fish ...

[para43] In my view, the evidence is clear and unambiguous. The waters of Koojesse Inlet are frequented by fish as defined in the *Fisheries Act*. In this part of the ocean, people actively net fish, dig and harvest clams and all within short distances of the lagoon. The Defendant's arguments to the contrary are not based on any evidence.

[para44] I am satisfied that all elements have been proven. Certainly there have been some questions raised, but no doubts.

[para45] Having answered yes to the first question, I now turn to the second: has the Defendant established any defence? My answer to this question in every aspect is no. My reasons are as follows:

DUE DILIGENCE:

[para46] To address this defence, I begin from the consideration stated by Dickson J. in *Sault Ste. Marie*:

> Has the Defendant exercised all reasonable care by establishing a proper system to prevent the commission of the offence and by taking reasonable steps to ensure that the effective operation of the system.

[para47] I conclude there is nothing to demonstrate or reflect anything that might be construed as due diligence. The Defendant was at best only perfunctorily and nominally involved -- on paper -- in the operation and maintenance of the lagoon. Yet, it was fully aware, through reports it commissioned, of what was required to operate such a facility.

[para48] In this regard, I refer to Exhibit 26, Guidelines for the Planning Design Operation and Maintenance of Wastewater Lagoon Systems in the N.W.T. produced for the Defendant dated November, 1988. I recognize that this exhibit titles itself as "guidelines" and not as a mandatory code. However, it is a useful discussion which is relevant to the issues before me. It shows that the Defendant was alive to the subject matter in 1988. As guidelines, the report marks the path that the Defendant may follow, complete with advice, direction and warnings.

[para49] Sewage lagoons are used to hold the raw sewage emanating from human settlements for a period of time wherein it undergoes some degradation, following which the high quality effluent is released into the watershed in concentrations that are, by and large, harmless. This is an ongoing process.

[para50] Sewage lagoons represent a practical, efficient and relatively inexpensive way of dealing with municipal waste water. They are used across North America and extensively in Northern Alberta and the N.W.T. They have been in use for many years, and the technology for their construction and operation is basic. They are not without problems however.

> Many problems exist in the application of published guidelines for wastewater lagoons when applied to conditions in the N.W.T. and in other parts of northern Canada. The severe climate in the N.W.T. causes winter freeze-up of receiving water courses potentially restricting the discharge of effluents. Cold water temperatures produce thick ice covers on lagoons for many months and reduce treatment performance during that time. Therefore lagoons may need to be designed for long-term storage of winter flows to achieve adequate performance. Design criteria based on a continuous discharge mode of operation cannot generally be used without serious environmental impact. Most lagoons in the N.W.T. need to be operated in a draw-fill mode with discharge occurring only once or twice a year, and in some locations, with continuous discharge during summer months only. The abundance of lakes near communities may, under certain circumstances, make their use as part of an engineered lake-lagoon system possible. Furthermore, construction, operation and maintenance of lagoons in the N.W.T. must take into account the special difficulties caused by the occurrence of deep frost penetration, existence of permafrost and the shortage of trained personnel in the N.W.T. For these reasons there is a need for guidelines for wastewater lagoons for the Northwest Territories, which this document addresses. (Guidelines for the Planning p. 2)

[para51] With respect to design the report has states:

> The lagoon should, if possible, be located to permit gravity drainage from the collection system. However, the lagoon must be located out of the flood plain so that its operation is not impaired by high water or flooding. The lagoon should not intercept surface runoff, ground water, or snowmelt. The use of lift stations should be minimized to reduce capital and operating costs as well as maintenance requirements. It may be necessary to install a lift or pump station near a lagoon to ensure that the mains do not surcharge. (my emphasis)

and further:

> The dykes should be constructed of impervious soil and compacted to 95 per cent of Standard Proctor density.
>
> This will reduce permeability and improve the side slope stability. This does not relieve the designer of the permeability requirements of Section 5.2.3.2. (my emphasis)

[para52] With respect to design features to prevent dyke erosion, the report states:

> Wind action and surface runoff are the two main sources of slope erosion. Several approaches are available for erosion protection of inner and outer slopes. The least expensive and most widely used method is grass cover from the toe of the outer slope to the toe of the inner slope. If grass cover is not practical, some form of revetment is necessary.

> Revetment materials can include rip-rap, soil cement, gabions, geocomposites, interlocking concrete blocks, sand bags, or scrap materials such as broken concrete or discarded tires. (my emphasis)

[para53] With respect to operation the report states:

> Wastewater lagoons are an attractive wastewater treatment technology for small communities since lagoons require relatively little attention to achieve good performance. However, some attention is necessary to ensure optimum performance and to prevent catastrophic failure of the lagoon system. (my emphasis)

[para54] With respect to planning and operation:

> The ground thermal regime, soil type, permeability, and slope stability are topics of importance in the design of a lagoon. A competent geotechnical specialist should be involved during the pre-design soil investigations and through detailed design and construction of a lagoon in cold regions. Catastrophic failures of the lagoon earthworks or serious pollution of ground water may occur if the geotechnical engineering is overlooked. The Cold Climate Utilities Manual provides an excellent review of geotechnical considerations in cold climates. (my emphasis)

[para55] Notwithstanding the simplicity of lagoon works, they cannot simply be ignored. They must be maintained and operated. Exhibit 26 sets out the operational and maintenance standards. These include checking that the lagoon works normally, adjusting the water levels and ensuring that the controls work, the keeping of records, repairs and the like.

[para56] Records are required:

> Record keeping is necessary to have information on what has happened. The use of accurate records is very important for the operator, the manager, the Department of Public Works, the Water Board and its supporting agencies and to engineers that may need to work on the system.
>
> The records must be detailed enough to allow evaluation of performance and to track the development of problems. The records also give a good check on completed tasks and those left to do ... (my emphasis)

[para57] Finally with respect to maintenance requirements the report states:

> Liners are installed to prevent water from seeping through the berm to avoid ground water pollution, and to ensure that the berm does not collapse because of washout or through pressure from ice lens formation within the berm. (my emphasis)
>
> The objective of berm and liner inspection is to make sure that leakage does not occur. The two major concerns are excessive growth of vegetation due to lack of cutting, which may

> hide developing problems, and erosion. Erosion of dikes is caused by wave action and surface runoff. The problems can be aggravated by animal burrows. (my emphasis)

[para58] Regular monitoring and maintenance are required to control berm erosion.

> Surface runoff will have been normally prevented from entering the lagoon through diversion ditches at the bottom of the outer berm slope. The ditches must be properly maintained to prevent blockage of drainage. (my emphasis)

[para59] These excerpts describe the fundamentals, and basic design, construction, operation, and maintenance techniques for sewage lagoons. I use this document not as an ideal, nor as a minimum in the sense of standards but only as its title suggests -- a guide. Even at that level it represents actual notice to and knowledge of the Defendant with respect to the issues, concerns, and needs generated by the establishment and operation of lagoon waste water treatment systems. Action on some of the guidelines might well have constituted due diligence. Unfortunately, for all intents and purposes, this document is not even remotely reflected in the operation of the Iqaluit sewage lagoon. The Iqaluit lagoon was out of sight and out of mind, under paper management only.

ACTS OF THIRD PARTIES:

[para60] The Defendant has argued vigorously that it was the intervening acts of third parties that contributed to, if not caused, the event so that the Defendant bears no responsibility. The Defendant refers to the Forward Operating Location construction site and new culverts. I agree that acts of third parties contributed to the event in question. However, in my view that fact does not absolve or shield the Defendant. The Defendant knew one year in advance of the project details, including modifications/replacements of culverts. The evidence reveals that there was a meeting in March, 1991 between the contractor involved, Municipal officials, and the Defendant's officials to discuss the works, including the replacement of the culverts. This aspect of the work is clearly shown on blueprints presented at the meeting. Yet, there was a want of even modest vigilance on the part of the Defendant as to what was occurring at the site from day to day or week to week. The Defendant's only concern was for its furniture warehouse. As I stated above, the Defendant knew and ignored what was occurring with respect to the construction project as it impacted on the drainage immediately uphill of the sewage lagoon. This ignorance is totally consistent with the confusion and non involvement of the Defendant in the maintenance, supervision and operation of the lagoon. The Defendant cannot shelter behind the acts or omissions of the contractor involved -- even if it did not follow municipal by laws -- for the simple reason that it knew, well in advance, that the work was going to affect the drainage and did nothing. Any person, exercising a modicum of vigilance over its undertaking would have seen the project under way and asked questions. This, in my view, is simply the principle stated by Dickson, J. in action.

ACT OF GOD:

[para61] An Act of God is an event that has been "caused directly and exclusively by such a direct and violent and sudden and irresistible act of nature as could not by any amount of ability

have been foreseen, or, if foreseen that it would happen, could not by any amount of care and skill be prevented." *McQuillan* v. *Ryan* 64 D.L.R. 482 applying *Nugent* v. *Smith* (1875) 1 C.P.D. 19.

[para62] Ford J. in *Low* v. *C.P.R.* [1949] 2 W.W.R. 433 stated:

> The defence of *vis major* or act of god is also relied on by the defendant. The decisions make it clear that it is a question of fact whether an occurrence of nature is so phenomenal or of such a magnitude as not to be reasonably foreseen and guarded against, the capacity to foresee being based on previous experience and knowledge of nature's law.
>
> Foreseeable adverse weather conditions require reasonable precautions. Whatever contributing influence can be attributed to nature, this influence could have been avoided by reasonable foresight and preventative steps. *Stuart J.R.* v. *Placer Developments* 13 CELR p. 52 (Yukon Territorial Court).

[para63] Historical data reveals that the temperature on June 1, 1991 was one of the warmest days on record. More precisely, the temperature reached a high not seen for 37 years. Evidence indicates temperatures at the period in question were as follows:

Date	Degrees Celcius
May 15	- 7.1
May 16	- 6.9
May 17	- 4.5
May 18	- 2.5
May 19	- 1.9
May 20	- 3.9
May 21	- 1.2
May 22	- 2.0
May 23	- 1.4
May 24	- 1.9
May 25	.8
May 26	- .7
May 27	- .8
May 28	- .7
May 29	1.9
May 30	3.5
May 31	7.9
June 1	11.7
June 2	9.6

[para64] The Defendant argues that this unseasonably high temperature must have caused significant runoff which resulted in flooding of the lagoon and the washout. I accept that the temperature was unusually high, however, that is not evidence of a flood problem. A report purporting to show precisely that was introduced into evidence and subsequently demolished in cross-examination. The report was flawed, based on fictitious data.

[para65] Common sense may tell us that a warm or hot day will cause snow to melt, but it cannot tell us what percentage nor how much will ultimately runoff and at what rate. Nor do I have any evidence that I accept in that regard. Iqaluit is by and large built on the side of a ridge of rising ground. If the temperature was such as to cause flooding, would there not be some evidence of such flooding elsewhere? I have no evidence of flooding problems anywhere else in the town.

[para66] Notwithstanding many past catastrophic failures of the west dyke due to spring runoff, the Defendant had not built or provided for any emergency overflow control or decant structure.

[para67] In my view the Defendant had the power and authority to prevent or control the alleged flooding. It could have simply maintained the drainage ditch; it could have liaised with the contractors doing nearby work altering the culverts; it could have been modestly vigilant. In history, in reports, in evidence, and in view of the general problem of spring runoff, the potential for flooding was evident; the problem was foreseeable. The Defendant's own documents must be taken to have made it alive to the issue.

[para68] Finally, there is no evidence other than the high temperature on that day that suggests a phenomenal natural occurrence that would fall under the legal understanding of an Act of God. The evidence is conclusive: care and skill would have prevented this washout, even with the elevated temperatures.

WATER LICENSE:

[para69] There is one issue that I must address if only to dismiss it.

[para70] Pursuant to the *Northern Inland Waters Act* and Regulations, the Northwest Territories Water Board has issued a Water License that relates to this sewage lagoon. The License, Exhibit 13, permits the use of certain water resources for municipal sewage purposes. It also sets standards for effluent quality after such use. In other words, for the quality of the discharge from the Iqaluit sewage lagoon.

[para71] It is argued that, for all practical purposes, the Defendant was the Licensee, and that I ought to recognize the Defendant as such in considering certain arguments: The Defendant has argued that, what one enactment -- the *Northern Inland Water Act*, and the actions of the Water Board set up thereunder -- permits, another enactment -- the *Fisheries Act* --cannot prohibit. Furthermore, there is a conflict between the two enactments in that they both purport to regulate the same matter -- the effluent quality discharged from the sewage lagoon. The Defendant argues that in (presumably) complying with the Water Board requirements, it is protected from prosecution under the *Fisheries Act*. If the effluent quality is such as to contravene the *Fisheries Act*, then this is an officially induced error.

[para72] The arguments ignore the fact that the effluent released between June 1 and June 10, 1991 exceed the quality standards set out in the License. It ignores the fact that the License, by its terms, is subject to "compliance with the requirements of other Federal or Territorial legislation". It ignores the fact that the Water License is issued to the Municipality of Iqaluit. It is the legal entity that is licensed to use water for its municipal purposes, and it is the entity that is subject to the terms, rights, and obligations of that License.

[para73] The Defendant, in policy and law, maintains the independence and separate identity of Municipalities. It cannot ignore that legal reality at its pleasure when convenient. This is what I am asked to do. I cannot. In my view, the instant case does not provide the factual basis which would allow me to rule on those arguments. The Defendant is not a party to the License.

[para74] The Water License and its terms are irrelevant in this case.

[para75] I convict the Defendant on Count 3.

ALBERTA COURT OF QUEEN'S BENCH

[Indexed as: Kostuch v. Alberta (Attorney General)]

IN THE MATTER OF Regina ex rel Kostuch v. The Queen in right of Alberta et al being information number 21075833P1 ("the information") sworn by Martha Kostuch in the Provincial Court of Alberta in the Judicial District of Calgary ("the Court") on the 28th day of July, 1992, alleging inter alia that The Queen in right of Alberta, UMA Engineering Ltd., W.A. Stephenson Construction (Western) Limited, and SCI Engineering & Construction Inc. ("the Accused") did contravene section 35(1) and 40(1)(b) of the Fisheries Act, R.S.C. 1985, c. F-14, and upon which summonses have been issued to the Accused by the Court to appear in Courtroom number GR-1 in the Court of Queen's Bench Courthouse in the City of Calgary on Monday, March 22, 1993 to answer the information.

Between: Martha Kostuch, Applicant, and The Attorney General of Alberta, Respondent

Power, J.

Calgary, August 30, 1993

***Fisheries Act*, R.S.C. 1985, c. F-14, ss 35, 35(1), 35(2), 37, 40(1)(b) – charge by private informant under *Fisheries Act* – provincial Attorney General intervened and directed stay of proceedings – application to set aside and prohibit Attorney General intervention and direction of a stay dismissed**

Criminal procedure – information laid by private informant – provincial Attorney General intervention and direction of stay – informant with reasonable and probable grounds can swear information – provincial Attorney General has exclusive jurisdiction unless information laid by federal government and federal Attorney General appears to prosecute – court will not interfere with decision to stay proceeding unless flagrant impropriety by the Attorney General

***Charter of Rights and Freedoms* – Attorney General intervention in a privately sworn information does not violate s. 7 unless there has been flagrant impropriety – likewise, there is no violation of s. 2(a), (b) unless there has been flagrant impropriety**

Summary: The applicant, a private citizen, laid an information before the Provincial Court of Alberta charging the accused with an offence under s. 35(1) of the *Fisheries Act* in respect of the construction of the Oldman River Dam. Following an *ex parte* process hearing, the learned trial judge issued process to compel all of the accused, except Hyundai, to attend at provincial court on a specified date. After various adjournments, at the date set for election and the hearing of the preliminary inquiry, two agents for the Respondent appeared before the court and intervened in the prosecution and directed the Clerk of the Court to enter a stay of proceedings under s. 579(1) of the *Criminal Code*.

This is an application under s. 24(1) of the *Charter of Rights and Freedoms* to set aside the intervention of the Respondent as prosecutor and the direction by the Respondent to the Clerk of the Court to enter a stay of proceedings on the basis that it infringed the Appellant's rights, specifically, s. 2(a) - freedom of conscience, s. 2(b) - freedom of opinion and expression and s. 7 - not to be deprived of security of the person except in accordance with the principles of fundamental justice. The Appellant also sought an order under s. 774 of the *Criminal Code* prohibiting the Respondent from intervening in the prosecution and prohibiting the Respondent from directing a stay of proceedings on the ground of reasonable apprehension of bias of the Respondent.

The learned justice reviewed extensively the events preceding the Applicant's Information, including the swearing of a similar private information, followed by intervention by the provincial Crown who also directed a stay of proceedings. Subsequently, the current Applicant was invited to submit her complaint to the appropriate authorities who would undertake a proper investigation. The investigation raised the question of whether there was any authorization of the alteration under s. 35(2) of the *Fisheries Act*. The court reviewed the various events related to the federal intention to delegate authority under s. 35(2) of the *Fisheries Act* to the province of Alberta, stating that it could be concluded that the federal Ministers of Fisheries and Oceans did authorize the dam under s. 35(2) of the *Fisheries Act*.

The court reviewed the role of the federal and provincial Attorneys General in prosecuting a charge under a federal act not dependent on the federal criminal law power for its constitutionality. Anyone with reasonable and probable grounds can lay an information. If neither Attorney General appears to conduct the prosecution, the informant may conduct the prosecution. The provincial Attorney General can always take conduct of prosecutions for a violation of federal legislation unless the information is laid on behalf of the federal government and counsel for the Attorney General of Canada appears. Prosecutorial discretion to enter a stay of proceedings is reviewable only where there is a flagrant impropriety on the part of the Attorney General. There was no evidence in this case that there was any flagrant impropriety, that the Attorney General failed to uphold a law or was acting with improper motives for an improper purpose.

With respect to *Charter* arguments, the court adopted the same test – there was no violation of an informant's rights under s. 7 unless there was flagrant impropriety by the Crown. As well, the Applicant's rights under s. 2(a) and (b) of the *Charter* did not extend to the circumstances in the case. Once again, without flagrant impropriety, there was not a *Charter* violation.

Held: Application dismissed.

REASONS/MOTIF:

R. Ian Cartwright, Counsel for the Applicant
T.A.H. Beattie, Counsel for the Respondent
Ingrid C. Hutton, Counsel for the Department of Justice

[para1] POWER J.:-- The Applicant Martha Kostuch applies for the following:

1. An order pursuant to s. 24(1) of the *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act*, 1982:

   (a) setting aside the intervention of the Respondent as the prosecutor of the Information, pursuant to s. 2 of the *Criminal Code*, R.S.C. 1985, c. C-46;

   (b) setting aside the direction of the Respondent to the Clerk of the Court to make an entry on the record that the proceedings on the Information are stayed pursuant to s. 579(1) of the *Criminal Code*;

on the grounds that such intervention and direction has infringed the rights of the Applicant as guaranteed by the *Charter*, specifically, sections 2(a) (freedom of conscience), 2(b) (freedom of opinion and expression) and 7 (not to be deprived of security of the person except in accordance with the principles of fundamental justice).

2. An application for an order pursuant to s. 774 of the *Criminal Code*:

   (a) prohibiting the Respondent from intervening in the prosecution of the Information;

   (b) prohibiting the Respondent from directing the Clerk of the Court to make an entry on the record that the proceedings on the Information are stayed;

on the ground of reasonable apprehension of bias of the Respondent.

FACTS

[para2] The Applicant relies on the facts as found in five judgments pertaining to the construction of the dam on the Oldman River, located in the southern part of the Province of Alberta.

1. *Regina ex rel. Kostuch* v. *Kowalski et al.* (1990), 57 C.C.C. (3d) 168, decided June 1, 1990, by His Honour Provincial Court Judge Harvie.

2. *W.A. Stephenson Construction (Western) Ltd.* and *SCI Engineering and Constructors Inc.* v. *Kostuch*; *R. In Right of Alberta* v. *Kostuch* (1991), 78 Alta.L.R. (2d) 131, decided January 3, 1991, by His Honour Provincial Court Judge Fradsham.

3. *Re W.A. Stephenson Construction (Western) Ltd. et al and Fradsham* (1991), 66 C.C.C. (3d) 201, decided July 4, 1991, and September 27, 1991, by Associate Chief Justice Miller of the Alberta Court of Queen's Bench.

4. *Re Friends of the Oldman River Society and the Queen in right of Alberta et al; Attorney General of Quebec et al, Interveners* (1992), 88 D.L.R. (4th) 1, decided January 23, 1992, by the Supreme Court of Canada. The complete historical background of the Oldman River Dam Project is found at pages 8 to 12.

5. Re *W.A. Stephenson Construction (Western) Ltd. et al* v. *Fradsham* (1992), 71 C.C.C. (3d) 266 (Alta.C.A.), decided January 10, 1992.

[para3] On July 28, 1992, the Applicant laid an Information (No. 21075833P1) before Her Honour Judge Bensler of the Provincial Court of Alberta pursuant to s. 504 of the *Criminal Code*. On the same date, Judge Bensler held an in-camera *ex parte* hearing (process hearing) pursuant to s. 507 of the *Criminal Code*. Judge Bensler heard evidence from the Applicant and submissions of her counsel, Ian Cartwright, and process was issued (summons) to compel all accused, with the exception of Hyundai Engineering & Construction Co. Ltd., to attend in Provincial Court on September 14, 1992, at 9:00 a.m.

[para4] The matter was adjourned from time to time until November 26, 1992, at which time the matter was further adjourned to March 22, 1993, at 9:30 a.m. for election and the hearing of the preliminary inquiry. On this date, Terrance J. Matchett and George Dangerfield, Q.C., acting as agents and counsel for the Respondent did two things:

1. Intervened in the prosecution pursuant to the definition "prosecutor" in s. 2 of the *Criminal Code*;

2. Directed the Clerk of the Court to enter a stay of proceedings pursuant to s. 579(1) of the *Criminal Code* which reads as follows:

> 579. (1) The Attorney-General or counsel instructed by him for that purpose may, at any time after any proceedings in relation to an accused or a defendant are commenced and before judgment, direct the clerk or other proper officer of the court to make an entry on the record that the proceedings are stayed by his direction, and such entry shall be made forthwith thereafter, whereupon the proceedings shall be stayed accordingly and any recognizance relating to the proceedings is vacated.

[para5] Ian Cartwright, Counsel for the Applicant, had been advised that these steps would be taken by the Respondent and arranged for this application to be heard in the Court of Queen's Bench of Alberta on June 28, 29 and 30, 1993.

[para6] It is important to review certain portions of the history of the Oldman River Dam in order to understand some of the issues that have come before the Court. In August 1988 the Applicant swore a Private Information under the *Federal Fisheries Act* alleging there had been a disruption or destruction of fish habitat at the Oldman River Dam site near Pincher Creek, Alberta. A Justice of the Peace issued process against Ken Kowalski, Minister of the Environment, the Department of the Environment, Ralph McManus of the Department and the construction company contracted to do the work on the dam. The summonses were returnable August 30, 1988, in Pincher Creek Provincial Court.

[para7] It was anticipated that the Federal Department of Justice would intervene in the matter, however, it was determined that they had no jurisdiction since the proceedings were not commenced at the instance of the Federal Government. The Provincial Attorney General's Department intervened and entered a stay of proceedings since there had been no investigation

conducted by an appropriate investigative agency and there was no evidence to support the charges. The Applicant was advised through her lawyer of the actions taken by the Attorney General and was invited to take any complaint based on reasonable grounds to the appropriate investigative agency, namely, the Provincial Department of Forestry, Lands and Wildlife, Fish and Wildlife Division, which had an office in Pincher Creek.

[para8] The R.C.M.P. were requested to conduct an investigation in relation to the allegations and report the findings to Bruce McFarlane, Q.C., General Counsel and Director for the Federal Department of Justice. Mr. McFarlane had agreed to review the results of the investigation and to prosecute any offence pursuant to the *Fisheries Act* that was supported by evidence, as the Department of Forestry, Lands and Wildlife was considered to have a conflict in the matter and so did the Attorney General of Alberta.

[para9] Inspector Stephen Allan Duncan of the R.C.M.P. was assigned to conduct the investigation with respect to the allegations made by the Applicant. A number of reports were prepared by Inspector Duncan.

[para10] The first report, dated November 4, 1988, stated that the object of the investigation was to determine if there existed a *prima facie* case on which to proceed against the parties named in the Private Information dated August 2, 1988, and to consider only the offence under the *Fisheries Act* and determine if sufficient evidence existed to proceed.

[para11] On October 27, 1988, the Applicant was interviewed by the R.C.M.P. who prepared a full statement on the basis of her complaint and why she believed an offence had been committed under the *Fisheries Act*. Violation under s. 35(1) of the *Fisheries Act*, c. F-14 states:

> (1) No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.

[para12] The Applicant contends that it is clear from the diversion of the river in July of 1988 that the fish habitat has been altered. It is also clear from several studies undertaken that the Oldman River did provide fish habitat.

[para13] One of the issues that arises comes under s. 35(2) of the *Fisheries Act* which states:

> (2) No person contravenes subsection (1) by causing the alteration, disruption or destruction of fish habitat by any means or under any conditions authorized by the Minister or under regulations made by the Governor in Council under this *Act*.

[para14] The Applicant's position is that she has proof to establish that the alterations were not authorized by the Minister nor are there regulations made by the Governor in Council under the *Fisheries Act*. The position of the Applicant is that the Federal Government cannot delegate to the Province of Alberta its authority under the *Fisheries Act*.

[para15] On January 9, 1987, Her Majesty the Queen in Right of Canada, represented by the Minister of Fisheries and Oceans, and Her Majesty the Queen in Right of Alberta, represented by

the Minister of Forestry, Lands and Wildlife, entered into the Canada-Alberta Fisheries Agreement, portions of which are set out as follows:

> WHEREAS Canada recognizes that Alberta has constitutional jurisdiction over privately held lands and over Crown lands in the province and has a proprietary interest in fish found in waters of the Province of Alberta; and
>
> WHEREAS Alberta recognizes that Canada has constitutional jurisdiction over inland fisheries, as provided in the *Constitution Act* 1982; ...

[para16] Article I sets out that the purpose of this agreement is "to renew and strengthen co-operation between Canada and Alberta; to achieve the goals as stated in the Fish and Wildlife policy for Alberta; and to ensure that, within the national framework, co-operative action is taken in pursuing the objectives of the Fish and Wildlife policy for Alberta". Article II, paragraph 2, states that

> "subject to constitutional and statutory constraints, administrative responsibilities under the *Fisheries Act*, identified in a subsidiary agreement hereunder, shall be delegated by Canada to Alberta or to such agency or official of Alberta as the subsidiary agreement shall provide". Article III, paragraph 1 reads:
>
>> This agreement, to be known as the "Canada - Alberta Fisheries Agreement, 1987", upon signature by an authorized representative of each Party, shall continue thereafter until terminated on one year's written notice from either Party to the other.

[para17] A Canada - Alberta News release dated January 9, 1987, announcing the Canada/Alberta Fisheries Agreement, states in part:

> The Canada/Alberta Fisheries Agreement reaffirms assignment of fisheries administrative responsibilities from Canada to Alberta and establishes a framework to address issues related to fish habitat management, aquaculture and fish health, sport fisheries development, commercial fisheries development, fish inspection and small craft harbours.

[para18] No evidence was tendered to the Court to indicate that the Canada - Alberta Fisheries Agreement of 1987 has been terminated by either the Federal government or the Alberta government.

[para19] Inspector Duncan, in the course of his investigation, contacted Ken Ambrock, Director of Habitat, Alberta Fish and Wildlife, Jim Nicholls, Director of Operations, Alberta Fish and Wildlife, Duane Radford, Alberta Fish and Wildlife, Lethbridge, Alberta, and Lorne Fitch, Regional Habitat Head, Fish and Wildlife, Lethbridge, Alberta, and established that there had been a task force set up to mitigate the damages caused by the Oldman River Dam Project. A series of projects had been planned upstream from the dam to enhance the fish population.

[para20] On December 12, 1988, Inspector Duncan prepared an investigation summary with respect to the Oldman River Dam Project and submitted it to the Department of Justice in Ottawa.

A third report is dated September 18, 1989. The investigation continued with Inspector Duncan interviewing the Director of Habitat, Ken Ambrock, and Jim Nicholls, and he was advised that the goal of the Department of the Environment was a "no net loss" of recreational fishing opportunity on the three rivers, i.e. Crowsnest, Oldman and Castle.

[para21] The investigation disclosed that the Province of Alberta does not contact the Federal Department of Fisheries each time permission to violate s. 35 of the *Fisheries Act* is required. The Provinces of Alberta and Saskatchewan are the only two provinces that do not seek this exemption under the *Fisheries Act.*

[para22] The next investigation report stated that on April 11, 1990, the decision of Justice A.J. Stone of the Federal Court stated that "the Minister of Fisheries and Oceans was obviously aware of the dam and reservoir project and of its possible adverse impact upon the fisheries in the Oldman River".

[para23] A letter dated June 25, 1987, from Tom Siddon, Minister of Fisheries and Oceans, to R. Kambeitz, the lawyer for the Bow River Chapter of Trout Unlimited, in reply to questions on who is responsible for management of fisheries in Alberta, was summarized in the investigation report of April 18, 1990, as follows:

a) Since 1930 and the passage of the *Natural Resources Transfer Act*, Alberta has managed its own natural resources.

b) Regulations under the *Fisheries Act* are drafted by the Province and promulgated by the Federal Government.

c) The federal-provincial "umbrella" agreement on fisheries matters is being prepared as well as a subsidiary agreement to more clearly define the roles in fish habitat management.

d) Officials of the Dept. of Fisheries and Oceans have consulted with Provincial Officials on the implications of the dam construction on fish resources.

e) In matters of fish habitat and the protection of fish it is the Minister of Forestry, Lands and Wildlife, Mr. Don Sparrow, whose Department would be responsible and the matter was referred to him.

[para24] In a letter written by Tom Siddon, Minister of Fisheries and Oceans, dated August 25, 1987, he advised that he did not propose to intervene in the matter. The Minister, in writing to Miss Bailey, President of the Southern Alberta Environmental Group, with a copy to the Alberta Minister of Forestry, Lands and Wildlife, indicates: "my regional staff in Winnipeg ... have also consulted with provincial government biologists who are responsible in Alberta for the day to day administration of fisheries management issues". The letter continued: "[we] ... are now awaiting the formulation of mitigation and compensation proposals to remedy the potential problems posed to the fisheries resources". His letter continued with:

> In view of the long-standing administrative arrangements that are in place for the management of fisheries in Alberta, and the fact that the potential problems associated with a dam are being addressed, I do not proposed [sic] to intervene in this matter.

[para25] From the statement contained in the letter of the Minister, one could conclude that the Minister authorized the project under s. 35(2) of the *Fisheries Act*.

[para26] In addition, there was correspondence from the Office of the Minister of the Environment on January 15, 1988, from Holly Martel to the President of Friends of the Oldman River which was reported as follows:

> "dam project falls primarily within provincial jurisdiction. The Federal Government is not directly involved with the proposal, and, therefore, it would be inappropriate for Environment Canada or Fisheries and Oceans Canada to intervene directly by attempting to link it to the Federal water policy."

[para27] The investigation concluded that it appears the Province acted in good faith, following completely the instructions of their Federal counterparts, which culminated on September 18, 1987, when the Minister of Transport issued approval to the Alberta government pursuant to the *Navigable Water Protection Act* to construct the dam. On February 5, 1988, interim licence #15410 was then issued by the Alberta Minister of Environment.

[para28] The next report is also dated April 18, 1990. Investigation continued with an interview with Mr. Walter Solodzuk, Alberta Deputy Minister of Environment from 1975 to December 1986. In January 1987, he signed a contract with the Province of Alberta to become the Assistant Project Manager of the Oldman River Dam, and he continued in this position until May 1988. Mr. Solodzuk advised that he has been concerned about the Provincial responsibility for administering the *Fisheries Act* since the sections in question came into being through Bill C-38 in 1977. Through Bill C-38, the *Fisheries Amendment Act*, ss. 31 and 33 (which are now sections 35 and 37) came into effect. Solodzuk appeared before the House of Commons Standing Committee on Fisheries and Forestry on June 16, 1977, opposing the amendments on the grounds that they repudiated any acknowledgement of Alberta's own Environment Control and Water Resources Management Program. He was told that the new legislation would provide stronger measures to protect fish habitat and to control water pollution, and that the Province of Alberta would administer these fish habitat provisions.

[para29] In May 1978, three Provincial Ministers wrote submissions to the Minister of Fisheries and Environment outlining the overlapping jurisdiction and stating how burdensome to the private sector were governmental regulations. It was submitted that the Province was responsible for ss. 31 and 33 of the *Fisheries Act*. These submissions completely reviewed these sections and suggested and asked that the Province have delegated authority.

[para30] On August 3, 1978, the Minister of Fisheries and Environment Canada, Roméo LeBlanc, wrote to the Honourable D.J. Russell, Minister of the Environment for the Province of Alberta, and stated as follows:

> With respect to Section 31 and to those parts of Section 33.1 that relate to the alteration, disruption or destruction of fish habitat, I consider these to be important parts of the overall fisheries management responsibility of those agencies in Canada that administer the fisheries. In Alberta this is the responsibility of the Provincial Government. Accordingly, I would see the Minister of Recreation, Parks and Wildlife in Alberta using all the habitat protection sections that are needed to manage the fisheries resource. This is consistent with the long-standing arrangements that we have had for the administration of fisheries in Alberta.
>
> Please find attached, a public information leaflet which we have recently prepared on the new fish habitat protection laws. (Section 31 and related parts of 33). You will note that explicit reference is made to the fact that it is the Provincial Government in Alberta which administers the *Fisheries Act* and that in Alberta it is the provincial fisheries management agency that is the contact to fish habitat protection requirements.

[para31] The pamphlet prepared by the Department of Fisheries and Environment entitled, "Planning Work Near the Water" states in part:

> In Alberta, Saskatchewan, Manitoba, Ontario and Quebec, where the federal Fisheries Act is administered by the provincial government, contact the appropriate provincial fisheries management agency.

[para32] On October 3, 1978, Len Marchand, Minister of Environment for Canada, wrote to the Honourable D.J. Russell, Minister of the Environment for the Province of Alberta, stating as follows:

> ... We agree that, wherever possible, a province should implement the pollution provisions of the *Fisheries Act*.
>
> In response to some of the specific issues raised in your submission, I confirm that Alberta has been delegated the authority to administer section 33 of the *Fisheries Act* and pertinent regulations made under section 33 [now s. 35]. In addition I will ask my colleague, the Honourable Roméo LeBlanc, to appoint Alberta officials as inspectors and analysts.

[para33] In an additional pamphlet issued by the Federal Fisheries Department entitled, "What the *Fisheries Act* says about fish habitat", the list of provincial fisheries contacts indicates, "In Alberta ... where the federal *Fisheries Act* is administered by the provincial government, contact the appropriate provincial fisheries management agency".

PROCEDURAL DEFECT OF THE APPLICANT

[para34] The Respondent raises in argument that the parties named in Information 21075833P1 have not been served with the Notice of Motion with respect to this application, referring specifically to UMA Engineering Ltd., W.A. Stephenson Construction (Western) Limited and SCI Engineering & Constructors Inc., pursuant to the *Alberta Rules of Court*, Part 60, Rule 827 reads as follows:

827. (1) The notice of motion shall be served upon every person who appears to be interested or likely to be affected by the proceedings.

(2) The Court may require the notice of motion to be served upon any person not previously served.

(3) Where it is sought to quash a conviction, order, warrant or inquisition, the notice of motion shall also be served at least seven days before the return thereof....

(4) Any person not served with a notice of motion may show that he is affected by the proceedings and thereupon may be permitted to take part in the proceedings as though served.

[para35] In the opinion of the Court, the rights of W.A. Stephenson Construction (Western) Limited, SCI Engineering & Constructors Inc., and UMA Engineering Ltd. may have been affected in the event that the Applicant were successful and they should have been served with a notice of motion and supporting material.

ROLE OF THE ATTORNEY GENERAL OF ALBERTA

[para36] In the case of *Regina* v. *Sacobie* and *Paul* 51 C.C.C. (2d) 430, the New Brunswick Court of Appeal set out in the headnote that in the prosecution of a violation of a federal statute (such as the *Narcotic Control Act* and the *Fisheries Act*) which does not depend for its constitutional validity on the criminal law power under s. 91(27) of the *British North America Act*, 1867, counsel for the Attorney General of Canada has exclusive jurisdiction to conduct the proceedings only if the information is laid, or the indictment is presented, by the Government of Canada and such counsel appears to conduct the proceedings.

[para37] Anyone may lay an information for such an offence (with some exceptions in certain statutes such as the *Combines Investigations Act*) if he has reasonable and probable grounds pursuant to s. 455 and s. 720 of the *Criminal Code* and if neither the provincial nor federal Attorney-General appears by counsel or agent to conduct the prosecution, the informant, his counsel or agent as the *Criminal Code* provides, may conduct the prosecution. Pursuant to the definition of "Attorney-General" in s. 2 of the *Criminal Code* the provincial Attorney-General and his counsel or agent may always take conduct of prosecutions for a violation of federal legislation except if the information is laid on behalf of the federal government and counsel for the Attorney-General of Canada appears.

[para38] If the Information is laid on behalf of the federal government but counsel for the Attorney-General of Canada does not appear, then counsel for the provincial Attorney-General has exclusive jurisdiction to conduct the prosecution.

[para39] When a prosecution has been commenced privately, the Attorney-General retains the right to intervene in the proceedings. Such intervention can have two purposes. It is open to the Attorney-General to intervene in a private prosecution in order to conduct the prosecution, for

example, to continue the proceedings that a private prosecutor intends to abandon on the grounds that the proceedings are in the public interest.

[para40] The exercise by the Attorney-General of his prosecutorial discretion to stay proceedings is not subject to review by a court except where there is a flagrant impropriety on the part of the Attorney General.

[para41] In *Re Balderstone et al. and the Queen* (1983) 8 C.C.C. (3d) 532 (Man.C.A.) (leave to appeal to the Supreme Court of Canada was refused), Monnin, C.J.M. expressed the principle as follows (at p. 539):

> The judicial and executive must not mix. These are two separate and distinct functions. The accusatorial officers lay informations or in some cases prefer indictments. Courts or the curia listen to cases brought to their attention and decide them on their merits or on meritorious preliminary matters. If a judge should attempt to review the actions or conduct of the Attorney General - barring flagrant impropriety - he could be falling into a field which is not his and interfering with the administrative and accusatorial function of the Attorney-General or his officers. That a judge must not do.

[para42] In *R*. v. *Moore* (1986), 26 C.C.C. (3d) 474, Huband, J.A. stated at p. 476:

> If the courts have the power to inquire into the exercise of that discretionary authority by the Attorney-General, then I do not see on what basis every exercise of his discretionary powers would not also be reviewable. There would have to be hearings and representations presented and heard before deciding what criminal charges should be laid against whom. The criminal law system would be in a shambles.

[para43] Since the *Charter of Rights* has been proclaimed, the provisions of s. 507 of the *Code* have been held to be constitutionally valid.

[para44] Based on the above authorities, absent a constitutional issue to be reviewed, the action is not justifiable with the possible exception where it can be said that there was "flagrant impropriety" on the part of the Attorney General in directing the stay. There can be no suggestion in this case that the Attorney General failed to uphold a law or that he was acting out of improper motives for an improper purpose.

[para45] Gerald Gunther, author of Individual Rights in Constitutional Law, 3rd ed. (1981), Foundation Press, cited by Tarnopolsky and Beaudoin: *Canadian Charter of Rights and Freedoms,* page 574, wrote in the July 6, 1987 edition of Time magazine, which was devoted to the 200th anniversary of the Constitution of the U.S.A.:

> It is important to remember that the *Charter* has its limits. Not all the social issues are constitutional ones. The Constitution is not an infinitely malleable instrument, not something to be treated as a tool to reach desired ends, not a justification for everything.

[para46] In Re Hamilton and the Queen 30 C.C.C. (3d) 65, the headnote reads as follows:

> While the *Criminal Code* provides that anyone may lay an information charging a person with a criminal offence the informant does not have a legal right or liberty to continue such a prosecution in the face of intervention by the Crown. The Crown has a discretionary right to intervene in criminal matters and having done so to stay the private prosecution. Once the Attorney-General or counsel on his behalf intervenes then that counsel assumes control of prosecution and that counsel's rights are paramount to the private person's or his counsel's rights. The right of everyone to liberty and the right not to be deprived thereof except in accordance with the principles of fundamental justice as guaranteed by s. 7 does not entitle the private informant to continue a prosecution when he is met by the Attorney-General's direction to enter a stay of proceedings pursuant to s. 508 of the *Criminal Code*, at least in the absence of clear evidence to support some flagrant impropriety on the part of the Crown officers.

[para47] In the case of *R.* v. *Osiowy* (1989), 50 C.C.C. (3d) 189, Vancise, J.A. of the Saskatchewan Court of Appeal, stated at p. 191:

> ... It is settled that an individual has the right to initiate a private prosecution. It is also settled that the Attorney General has the right to intervene and take control of a private prosecution. Included in the right to intervene and take control is the power to direct a stay pursuant to s. 508. It follows, then, that a private informant has the right to initiate proceedings; but that right does not give him the liberty to continue the proceedings should the Attorney-General decide to intervene and invoke s. 508(1) and direct the entry of a stay of proceedings. Once the Attorney-General or counsel on his behalf intervenes and assumes control of the prosecution, that counsel's rights are paramount to the private person's or his counsel's rights. The discretion of the Attorney-General to enter a stay is not reviewable in the absence of some flagrant impropriety on the part of the Crown officers.

[para48] In Re W.A. Stephenson Construction (Western) Ltd. and Fradsham;, 66 C.C.C. (3d) 201, Miller A.C.J. stated at p. 206:

> Generally, the degree of impropriety to be met before the court will intervene to reverse an action by the Attorney-General is very extensive. It must border on corruption by the Crown, violation of the law, bias against the particular offence, or prejudice against the accused or the victim.

[para49] No such impropriety has been established by any of the evidence called on behalf of the Applicant.

[para50] The Applicant has made no allegations of flagrant impropriety by the Respondent. The Respondent's actions in sending the matter to the Federal Attorney-General and the Manitoba Attorney-General was entirely appropriate, given the circumstances of the matter.

[para51] Once the Attorney-General intervenes in a prosecution, he assumes control of the prosecution and has the right to stay those proceedings despite the wishes of the Informant. In the absence of flagrant impropriety on the part of the Crown officers, such action does not constitute a violation of the Informant's rights under s. 7 of the *Charter of Rights and Freedoms*.

[para52] Section 7 of the *Charter* reads as follows:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[para53] In *R.* v. *Mills*, [1986] 1 S.C.R. 863 at 919-20, Lamer, J. stated:

> ... security of the person is not restricted to physical integrity; rather, it encompasses protection against "overlong subjection to the vexations and vicissitudes of a pending criminal accusation..." These include stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to the outcome and sanction.

[para54] In his textbook Legal Rights in the *Canadian Charter of Rights and Freedoms*, 2nd ed., the Honourable David C. McDonald stated at p. 137:

> - The guarantee of "liberty" in s. 7 was held not to have been violated when the Crown intervened in a private prosecution and directed that a stay of proceedings be entered. McKenzie J. held that, even accepting the "expanded definition of liberty" adopted by Nemetz C.J.B.C. in *R.* v. *Robson* [(1985), 45 C.R. (3d) 68], the private prosecutor's "liberty... does not free him to continue a prosecution when he is met by the Attorney General's direction to enter a stay of proceedings".

[para55] In *R.* v. *Lyons*, [1987] 2 S.C.R. 309 at 361, La Forest, J. expressed the following views as to the principles of fundamental justice as that phrase is used in s. 7:

> It is clear that, at a minimum, the requirements of fundamental justice embrace the requirements of procedural fairness .... It is also clear that the requirements of fundamental justice are not immutable; rather, they vary according to the context in which they are invoked. Thus, certain procedural protections might be constitutionally mandated in one context but not in another.

[para56] The analysis of s. 7 involves two steps as summarized in *R.* v. *Beare*, [1988] 2 S.C.R. 387, reversing [1987] 4 W.W.R. 309, by La Forest J., for the Court, who stated at p. 401:

> To trigger its operation there must first be a finding that there has been a deprivation of the right to "life, liberty and security of the person" and, secondly, that that deprivation is contrary to the principles of fundamental justice. Like other provisions of the *Charter*, s. 7 must be construed in light of the interests it was meant to protect. It should be given a generous interpretation but it is important not to overshoot the actual purpose of the rights in question ....

[para57] The former s. 508 of the *Criminal Code* which gives the Attorney-General the power to stay proceedings does not violate s. 7 of the *Charter*, notwithstanding that the section itself does not contain any guidelines for the exercise of the Attorney General's discretion. The section is an adequate expression of the power which has always rested in the Attorney General and which is essential to the proper enforcement of criminal law.

[para58] Safeguards of the individual against the improper use of the power to stay which existed before the *Charter* was proclaimed continue to exist. Those safeguards have been enhanced by the rights guaranteed under the *Charter* together with the power of the court to give a remedy if necessary.

[para59] Under the *Canadian Charter of Rights and Freedoms* s. 2 refers to the fundamental freedoms which include:

> 2 Everyone has the following fundamental freedoms:
>
> (a) freedom of conscience and religion;
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media communication;

[para60] In my opinion, the Applicant's rights under s. 2(a) and (b) do not extend to the circumstances of this case. Absent flagrant impropriety by the Respondent, the actions in intervening in this prosecution and entering a stay do not violate the Applicant's rights under s. 2(a) and (b) of the *Charter*.

[para61] The Applicant has failed in her challenge with respect to the steps taken by the Attorney-General of Alberta in entering a stay of proceedings.

[para62] In the opinion of the Court, it would be an abuse of process to allow this litigation to proceed further. The Respondent has provided full and complete information to the Applicant with respect to the investigation conducted by the R.C.M.P. into this matter. If the issues were permitted to be relitigated, it would raise the spectre of improper motive of the Applicant to harass the Respondent unreasonably.

[para63] For these reasons, I would dismiss the application. If costs are being asked for, they may be spoken to by the parties.

SASKATCHEWAN PROVINCIAL COURT

[Indexed as: *R.* v. *Lerat*]

Between Regina, and Peter Lerat

Rathgeber Prov. Ct. J.

Broadview, September 29, 1993

***Fisheries Act*, R.S.C. 1985, c. F-14, ss 24, 26(a), 42(2)(e) – treaty Indian charged under ss 42(2)(e), 24 and 26(a) – charges did not infringe treaty rights under Treaty 4 – accused convicted**

Treaty rights – no evidence of fishing as an avocation at the time of treaty signing – evidence of fishing after treaty is not evidence of a treaty right – sale of fish not a part of Indian culture at the time of treaty signing – treaty right to sell fish is subject to reasonable government regulation

Summary: The accused, a treaty Indian, was charged with 3 offences under the *Fisheries Act*: selling fish contrary to s. 42(2)(e); setting a net in a manner that obstructs navigation contrary to s. 24; and fishing with a net without an authorizing license contrary to s. 26(a).

The accused admitted to selling a small amount of fish and claimed that his treaty right under Treaty 4 included the right to sell fish or that he had a treaty right to sell fish commercially. The court found that as a matter of law, there is no treaty right to sell fish without a license. The learned judge distinguished *R.* v. *Horseman* as a case dealing with hunting; hunting and trapping as part of the fur trade was historically different from fishing. Further, there was no evidence that the sale of fish for food was an integral part of Indian culture at the time of treaty signing and therefore cannot be a right under the treaty. Evidence that the Hudson Bay Company hired an Indian to fish is not the same as evidence of commercial fishing. Evidence of fishing after treaty is not necessarily evidence of a treaty right. The treaty right to fish for food has not evolved to include the sale of fish or commercial fishing. Even if the sale of fish for human consumption is a treaty right, it is subject to reasonable government regulation. Commercial licenses would not have been issued for the lakes in question due to mercury contamination.

With respect to the charge of setting a net so as to obstruct navigation, there was no interference with a treaty right as the regulation has reasonable conservation objectives and as well as ensuring free navigation. Similarly, on the charge of using a net without a license, the treaty right is subject to conservation measures. The regulation is reasonable and justified to conserve the fish stock.

Held: The accused was found guilty.

REASONS/MOTIF:

David Gerecke, Counsel for the Accused

P. Mitch McAdam, Counsel for the Crown

[para1] RATHGEBER PROV. CT. J.:-- The accused is an Indian living on the Cowessess reserve which was created by Treaty No 4 in 1874. He is charged with three offences under the *Fisheries Act* namely; selling fish contrary to Sec. 42(2)(e), setting a net in a manner that obstructs navigation contrary to Sec. 24, and fishing with a net without an authorizing license contrary to Sec. 26(a).

[para2] On the charge of selling fish, the accused admitted to the sale of a small quantity of fish to a friend. The proceeds were used to purchase gasoline for his truck. In answer to the charge the accused contends firstly that the treaty right to fish for food includes the sale of fish or alternatively that he has a treaty right to fish commercially.

[para3] Treaty No 4 states "... Her Majesty agrees that Her Indians shall have the right to pursue their avocations of hunting, trapping and fishing throughout the tract surrendered, subject to such regulations as may from time to time be made by the Government of the country.

[para4] As a question of law, the case of *R.* v. *Sundown*, [1988] S.J. No. 49 (Q.B Feb. 11/88) held that it is not a treaty right to sell fish without a license. I believe I am bound by that decision although the Crown concedes the *Natural Resources Transfer Agreement* is not applicable here. The ratio of that case was based on the wording of the treaty and I do not agree that such case has been superseded by *R.* v. *Horseman*, [1990] 1 S.C.R. 901, or *R.* v. *Littlewolf*, [1992] A.J. No. 726. Those cases dealt with hunting rights. As a question of fact, hunting and trapping for the fur trade as an avocation was historically different from fishing. The extent of the right to fish contained in the treaty hinges on evidence of fishing as an avocation at the time of the treaties. The fur trade was the major business of the Hudson Bay company from its charter in the 17th century. The difference between hunting, trapping and fishing was probably due to the perishable nature of the product and the lack of demand for fish by the Europeans.

[para5] There is evidence that the Hudson Bay Company hired an Indian to fish during the winter but it does not follow that it is therefore a treaty right to sell fish. In doing so the company was not buying fish. Hiring out your services as a fisherman is different in kind from fishing commercially and does not give rise to the treaty right to sell fish. Other evidence of the sale of fish prior to 1874 is sparse. Evidence was led as to the fishing practice after 1874 and insofar as it confirms the prior practice, it is certainly relevant to determination of the extent of the treaty right. However such evidence as there is of the sale of fish is not necessarily evidence of a treaty right. I think it is an error to assume that everything Indians did was pursuant to a treaty right. Their treaty rights were in addition to the rights enjoyed by all including the sale of fish. But there is evidence that Indian food fishing during closed season was allowed on a limited basis, and Indians fished commercially with licenses along with non Indians according to the early fisheries reports. Fishing was only one of the many non treaty commercial endeavours the Indians engaged in to earn their living.

[para6] Nor is it entirely clear that such commercial or net fishing was conducted legally. A reading of the sessional papers cannot leave one with any other impression than that the laws and their general enforcement were in a very early stage. There are many entries which report, the

seizure of nets and it would appear that at least the fisheries dept considered their regulations to be among those the Indians had undertaken to abide by in the treaty. Some of the Indian agents encouraged fishing, but whether with or without licenses or as a treaty right, or a general right, is not clear. By at least 1893 conservation laws had become a necessity.

[para7] A consideration of all the evidence does not lead to the conclusion that sale of fish was an integral part of the culture of the Indians at the time of the treaty. While fishing for food was common, sale among Indians or to Europeans was not and I conclude that the right to fish for food is what is meant by "avocation" in the context of the treaty.

[para8] Furthermore I cannot conclude that the sale of fish to obtain money to buy food or fishing supplies is part of or a logical extension of the treaty right. While the Treaty right to fish, may be exercised by modern means, I do not find it to be the law that the right itself evolves so as to include sale either commercially or as part of the food fishing right. I conclude there is no right to sell fish caught for food and there is no treaty right to sell fish commercially separate from food fishing.

[para9] If the sale of fish for human consumption is a treaty right, such right is also subject to reasonable or justifiable government regulation. The public has come to expect certain standards of safety and inspection in the sale of food and mercury contamination has made the fish largely unsafe for human consumption. The evidence establishes that a commercial license, meaning the right to sell fish, would not have been granted for the lakes in question due to the mercury content. Such, regulation is justifiable. Public safety concerns require some regulatory limits on the right to sell food.

[para10] I find the accused guilty of the charge under section 42(2)(e) of selling fish without the required license.

[para11] On the charge of setting a net so as to obstruct navigation, the accused contents firstly that his net did not obstruct navigation on the river, and alternatively, if he did so, Sec. 24 is an unjustified interference with his treaty right to fish.

[para12] I am satisfied from the evidence that the net was set is such a way that it covered the entire river from bank to bank. Navigation was obstructed.

[para13] The accused states that Sec. 24 is an interference with the treaty right to fish. The evidence establishes that prohibiting netting the entire width of the river has a conservation objective as well as ensuring free navigation. On both points the regulation is reasonable in intent and application and not an unjustified interference with the right to fish. I find the accused guilty on the second count, as charged.

[para14] On the charge of fishing with a net without an authorizing license, the accused contends Sec. 26(a) requiring a license is an unjustified infringement of his treaty right to fish. The evidence establishes that the license is a conservation measure. Indian food fishing is a priority subject only to conservation requirements, but without some regulatory method there would be no way of controlling even the amount of Indian food fishing in order to conserve the stock. The regulation

recognizes that fishing with a net has the potential to damage the stock in a way that angling does not. I am satisfied that the regulation is reasonable in both its intent and application and is justifiable. The accused is required to obtain such a license and accordingly I find him guilty as charged.

[para15] I am indebted to counsel for their well prepared submissions.

NOVA SCOTIA COURT OF APPEAL

[Indexed as: R. v. Canada (Minister of National Defence)]

Between Her Majesty the Queen in Right of Canada (Department of Fisheries & Oceans), Appellant, and Her Majesty the Queen in Right of Canada (Department of National Defence), Respondent

Freeman, Hart and Roscoe JJ.A.

Halifax, September 30, 1993

***Fisheries Act*, R.S.C. 1985, c. F-14, ss 3(2), 35(1), 78(a) – charge against federal Crown represented by Minister of National Defence – issue whether Act applies to the Crown – whole of *Fisheries Act* is binding on the Crown**

***National Defence Act*, R.S.C. 1985, c. I-21, s. 269 – 6 month limitation in s. 269 does not bar prosecution against the Crown under other acts**

Summary: The accused, the Crown in Right of Canada, as represented by the Minister of National Defence, was charged under s. 35(1) of the *Fisheries Act* with carrying on a work, specifically a bridge construction field exercise at the Cape Breton rifle range, that resulted in the harmful alteration of fish habitat. At trial, the learned judge found that Her Majesty was not immune from prosecution, but that the prosecution was barred by the 6 month limitation period in the *National Defence Act*.

The Court of Appeal agreed with the trial court on the question of whether the *Fisheries Act* is binding on the Crown. S. 3(2) expressly binds Her Majesty in Right of Canada or a Province. However, the court disagreed with the trial court's finding on the applicability of the 6 month limitation in s. 269 of the *National Defense Act* to the Crown. The *National Defense Act* does not apply to proceedings brought against the Crown, but only applies to persons performing duties under the *National Defence Act*. It could not have been the intention of Parliament to protect the Crown as a "person" under s. 269.

Held: Appeal allowed; matter remitted to the Provincial Court for trial.

REASONS/MOTIF:

Wayne J. MacMillan and Michael A. Paré, Counsel for the Appellant
Mark E. MacDonald and Robert G. Grant, Counsel for the Respondent

[para1] FREEMAN J.A.:-- The issue in this appeal is whether Her Majesty the Queen in the Right of Canada as Represented by the Minister of National Defence is a proper defendant in a prosecution under the *Fisheries Act*, R.S., c. F- 14, brought in the name of Her Majesty the Queen, also in right of Canada, represented by the Minister of Justice.

[para2] The information alleges that Her Majesty between April 1, 1991 and April 11, 1991, carried on work at Wash Brook, Cape Breton County, that resulted in the harmful alteration of fish habitat contrary to s. 35(1) of the *Fisheries Act*, thereby committing an offence under s. 78(a) of the *Fisheries Act*. The work was actually done by members of the 45th Field Engineering Squadron of the Canadian Armed Forces as part of a bridge construction field exercise undertaken at the Cape Breton rifle range.

[para3] The trial judge found that Her Majesty was not immune from prosecution but he decided on a preliminary motion that the prosecution was barred by the six-month limitation period in s. 269 of the *National Defence Act* R.S.C. 1985 c. N- 5, .

[para4] S. 17 (formerly s. 16) of the *Interpretation Act* R.S.C., c. I-21 provides:

> " 17. No enactment is binding on Her Majesty or affects Her Majesty's rights or prerogatives in any manner, except as mentioned or referred to in the enactment."

[para5] S. 34 (2) (formerly s. 27) of the *Interpretation Act* provides:

> " All the provisions of the *Criminal Code* relating to indictable offences apply to indictable offences created by an enactment, and all the provisions of that *Code* relating to summary conviction offences apply to all other offences created by an enactment, except to the extent that the enactment otherwise provides."

[para6] S. 2. of the *Criminal Code* provides that "in this act. . . 'every one', 'person', 'owner' and similar expressions include Her Majesty . . . "

[para7] In *R.* v. *Eldorado Nuclear Limited* (1984) 4 D.L.R. (4th) 193 (S.C.C.) Chief Justice Dickson, as he then was, held that "in the absence of a provision expressly incorporating the *Criminal Code* definition of 'every one' into the *Combines Investigation Act*, the definition applies only in the *Code* itself."

[para8] With respect to ss. 17 and 34, then respectively ss. 16 and 27, he wrote:

> "Section 16 makes the Crown immune unless expressly bound, and it cannot be that s. 27 of the same *Act* binds the Crown unless expressly exempted. In my view s. 27 (2) of the *Interpretation Act* does not import the *Criminal Code* definition of "every one" into the *Combines Investigation Act*, and it does not make the latter *Act* binding on the Crown."

[para9] In *CNCP Telecommunications* v. *Alberta Government Telephones* (1989), 98 N.R. 161 at p. 220 he explained further:

> "Section 16 requires a clear Parliamentary expression of an intention to bind the Crown. This does not necessarily require that a federal enactment requires a section stating "This *Act* shall bind Her Majesty" (although such a provision, as a matter of legislative drafting, would put the issue beyond doubt).

[para10] S. 3(2) of the *Fisheries Act* provides:

> "This *Act* is binding on Her Majesty In Right of Canada or a Province. "

[para11] In my opinion therefore the whole of the *Fisheries Act* is binding on the Crown; Her Majesty is not immune from prosecution under the *Fisheries Act* for offences committed in her name.

[para12] The obvious intention of Parliament in enacting s. 2 of the *Criminal Code* was to make the concept of the criminal liability of the state, as personified by Her Majesty, a feature of Canadian criminal law. The respondent referred to jurisprudence from other Commonwealth jurisdictions relating to crown immunity. In my opinion the question is settled in Canada by statutes supported by jurisprudence: the state is not above the penal law nor immune from prosecution under it when the binding intention of a statute is clear.

[para13] Similar conclusions were reached respecting the liability of the Crown in right of a province in *R.* v. *Forest Protection Limited* (1979), 25 N.B.R. (2d) 513 and *R.* v. *British Columbia* [1992] 4 W.W.R 490 (B.C.S.C.).

[para14] In the British Columbia case Shaw J. distinguished *Canadian Broadcasting Corp.* v. *Ontario (Attorney General)*, [1959] S.C.R. 188, 122 C.C.C. 305, 16 D.L.R. 609 in which the C.B.C. as a Crown agency was found not to be a "person" subject to prosecution under the *Lord's Day Act*. Shaw J. found that case "involved quite different legislation .... The Court was not addressing anything comparable to the scheme of the *Fisheries Act* and the quite specific wording of s. 3(2) of that *Act*.

[para15] There is a similarity between the facts in present case and those in *Department of the Environment, Canada* v. *Department of Public Works, Canada*, (1992) 10 C.E.L.R. (N.S.) 135 (C.Q.), which set a precedent as the first case in which one minister of the federal Crown had prosecuted another. Public Works had misread its authorization from Environment and unlawfully dumped sand from a dredging operation in the Magadalen Islands over lobster grounds during a season when lobsters were breeding. Decoste J. of the Court of Quebec considered arguments of Crown immunity but found that s. 4 of the *Canadian Environment Protection Act*, S.C. 1988, c. 22 [R.S.C. 1985, c. 16 (4th Supp.)] provided a complete answer. It is identical to s. 3(2) of the *Fisheries Act*.

[para16] In the present case the proceedings were brought approximately a year after the alleged offence. The respondent argued that Her Majesty in right of the Minister of National Defence was protected by a six-month limitation period on prosecutions. S. 269(1) of the *National Defence Act* was pleaded on her behalf:

> " No action, prosecution or other proceeding lies against any person for an act done in pursuance or execution or intended execution of this *Act* or any regulations or military or departmental duty or authority, or in any respect of any alleged neglect or default in the execution of this *Act*, regulations or any such duty or authority unless it is commenced

> within six months after the act, neglect or willful default complained of or, in the case of continuance of injury or damage, within six months after the ceasing thereof."

[para17] Counsel agreed that s. 269(1) created a limitation period for the benefit of persons performing duties under the *National Defence Act* that applied even when proceedings were brought under other federal acts. I will assume that to be the case. The issue is whether s. 269 applies to proceedings brought against Her Majesty under another federal act. I agree with the appellant that the s. 269 limitation does not apply to such proceedings against the Crown.

[para18] Parliament's obvious primary intention in enacting s. 269 was to create a prescriptive defence for National Defence personnel with respect to the large number of military offences created by the *Act*. Her Majesty is not bound by the *National Defence Act* as she is by s. 3(2) of the *Fisheries Act* and s. 4 of the *Environmental Protection Act*. As she cannot be prosecuted for offences under the *National Defence Act*, it could not have been the intention of Parliament to protect her as a "person" under s. 269. The language does not support a conclusion that it was intended to apply to Her Majesty with respect to prosecutions under other acts. In my opinion the Crown is not a "person" entitled to the protection of s. 269 and the trial judge erred in finding that the six-month limitation period applied to Her Majesty.

[para19] A similar result was reached in *Pelletier* v. *R.* [1970] Ex. C.R. 2 and *Way* v. *Canada and John Doe* (1993) 63 F.T.R. 24.

[para20] The respondents argued that the prosecution of Her Majesty in Right of Canada by Her Majesty in Right of Canada creates an absurdity. While there may be conceptual difficulties, these must yield to the principle that Her Majesty in Right of Canada or a Province is not above the law. When a statute that Parliament has made binding upon Her Majesty is violated in her name and on her behalf, the declarative effect of a finding of guilt is more important than the penalty imposed. This is particularly true when the statutory violation consists of an act destructive to the environment. Decoste J. dealt with a similar argument in the Environment Canada case.

> "Moreover, even if it is subject to the *Act*, what justification is there for a charge, knowing full well that the Treasury Board would receive from one hand (Environment Canada) what is paid with the other (Public Works Canada)? . . .we invited prosecuting counsel to explain the justification for these proceedings.
>
> First, he submitted, the general deterrent aspect is very important. By this, he meant sending a clear message to our private sector of the seriousness of the objective adopted by Parliament: the protection of the environment, of human life and of the health of Canadians. They want to practise what they preach.
>
> Second, they also want by doing this to make government employees and contractors take more responsibility. They must also be sensitized to this concept of the environment, and act in such a way that none of the many decisions which they must make involve the slightest risk to environmental protection.
>
> In my opinion, these two reasons alone fully justify the initiation of criminal proceedings."

[para21] Decoste J. imposed a fine of $1.00 and ordered a $100,000 (reduced to $40,000 on appeal) cleanup of the damaged lobster grounds.

[para22] I would allow the appeal and remit the matter to the Provincial Court for trial.

BRITISH COLUMBIA PROVINCIAL COURT

[Indexed as: R. v. Agrifoods International Co-operative Ltd.]

Between Regina, and Agrifoods International Co-operative Ltd. and Fraser Valley Milk Producers Cooperative Association, carrying on business as 'Dairyland Foods'

Tweedale Prov. Ct. J.

Burnaby, October 8, 1993

***Fisheries Act*, R.C.S. 1985, c. F-14, ss 36(3), 40(2), 79.2(f) – charge of depositing a deleterious substance – spilled chemical flushed into storm sewer – failure to report spill – guilty plea**

Sentencing – fine of $5,000 – order under s. 79.2(f) to pay $10,000 to Crown to improve fish habitat – each sentence is fact specific – pollution offences must be treated as crimes

Summary: The accused company was charged under s. 36(3) of the *Fisheries Act* with depositing a deleterious substance under conditions where the substance may enter water frequented by fish. The company pleaded guilty to the charge. Although the Crown elected to proceed by indictment, the Crown asked that the sentencing hearing proceed as if it had chosen to proceed summarily.

The accused company spilled one or two containers of a cleaner, Miraclean, in its yard. Company employees washed the area of the spill with water and either flushed it into the storm sewer drain or took insufficient care to keep the chemical away from the drain. The diluted chemical traveled through the storm sewer into a tributary of Still Creek, which are waters frequented by fish. The spill resulted in a fish kill in the tributary. The company did not report the spill to the Department of Fisheries until questioned by a Fisheries Officer. Company employees were not trained to deal with spilled chemicals and did not follow the manufacturer's instructions for cleaning up a spill of Miraclean. Following the incident, the company instituted various improvements including its method of storing Miraclean, significant expenditures on rebuilding drains and new monitoring equipment and company training.

In arriving at appropriate sentencing principles, the learned judge agreed with two points in *R.* v. *United Keno Hill Mines Ltd.*: that each sentence is fact specific and pollution offences must be approached as crimes. In this case, aggravating factors were the company's failure to train its employees and its failure to report the spill; mitigating factors were the company's cooperation after the spill and its remedial steps.

Held: Fine of $5,000 plus order under s. 79(2)(f) to pay $10,000 to the Crown for enhancement of fish habitat in Still Creek and its tributaries.

REASONS/MOTIF:

John D. Cliffe and Daniel M. Scanlan, Counsel for the Attorney General of Canada
William K. McNaughton and C. Januszczak, Counsel for the Defence

TWEEDALE PROV. CT. J.:--

The Offence

[para1] The accused, referred to here as the company, pled guilty to depositing a deleterious substance at its Burnaby plant under conditions where the substance may enter water frequented by fish - sections 36(3) and 40(2) *Fisheries Act*. R.S. c. F-14, as amended.

[para2] The offence is indictable or punishable on summary conviction. The Crown proceeded by indictment only because the charge was sworn past the limitation period for summary conviction proceedings. The Crown asked that I sentence as if it had chosen to proceed summarily.

Penalty

[para3] The summary conviction penalty for a first offence (the case here) is a fine not exceeding $ 300,000.

Facts

[para4] In the early morning of July 25, 1991, one or two containers (the evidence is unclear) of Miraclean 12 spilled in the yard of the company's Lougheed Highway plant in Burnaby. Miraclean 12 is a cleaner with a 12% concentration of sodium hypocholrite.

[para5] This occurred when the one or two Miraclean containers, each containing 23 litres, ruptured. It is not clear to me from counsel's submissions exactly how the rupture occurred. For the purposes of sentencing, the storage and cause of the rupture are not of great importance. It is the action taken after the discovery of the spill by the company's employees that gives rise to the charge.

[para6] The employees washed the area of the spill with about 2200 litres of water. They then either flushed the diluted Miraclean into a nearby storm sewer drain or took insufficient care in keeping the diluted chemical away from the drain. (For the purpose of sentencing either action is blameworthy as it shows that the company failed to property train its employees to deal with a chemical spill of this kind.)

[para7] The diluted Miraclean then travelled into a storm sewer and ended up in an unnamed tributary which runs into Still Creek. Both the tributary and Still Creek are waters frequented by fish.

[para8] The Crown called evidence to prove that this spill not only had the potential to kill fish, but that fish were killed as a result. Defence counsel challenged this evidence and argued the Crown had not proven beyond a reasonable doubt this aggravating factor.

[para9] Twenty or more dead carp, catfish, stickleback and trout were seen by a Burnaby Health Inspector at about 845 a.m. on July 25 in still Creek, near the unnamed tributary and storm sewer outfall referred to above.

[para10] The Crown called as an expert Lee Nikl, a Department of Fisheries biologist. Mr. Nikl examined two of the dead carp that morning. His expert opinion was that the fish had died within 24 hours. There being only conjectural possibilities of other sources for the fish kill, I consider the evidence sufficient to establish the Miraclean spill caused the death of the fish.

[para11] Fortunately, the fish kill was not large and there was no continuing or long-term damage to the water or the surrounding area.

[para12] On the afternoon of July 25, Mr. Nikl, the fish biologist, went to the company's plant and interviewed Lorne Vallee, the plant manager. Mr. Vallee was not aware of the chemical spill. He agreed to make inquiries. The next day Mr. Vallee contacted Mr. Nikl. Mr. Vallee had learned that the spill had occurred at 1:30 a.m. on July 25. He understood two Miraclean containers had ruptured when a pallet fell over and they were crushed.

[para13] On August 2, Scott Gilbert, a fishery officer, went to the company's plant. Mr. Vallee gave him a written statement about the spill and the clean-up action.

[para14] It is clear from the statement that 1) the employees were trained to dilute the spilled chemical, but were not trained to keep the diluted chemical out of drains, sewers and surface waters 2) Mr. Vallee was not aware of the Miraclean manufacturer's recommendation to use a dry chemical to absorb the spill and then safely dispose of the residue 3) the company's reporting procedures did not result in Mr. Vallee being told of the spill, nor a report being made to the Department of Fisheries.

[para15] Sometime in August 1991, the company installed signs where chemicals were kept which read: CHEMICAL SPILLS - NOT TO BE FLUSHED TO ANY STORM SEWER - NOTIFY A SUPERVISOR IMMEDIATELY.

[para16] At the time of the spill, the pallets holding the Miraclean were double-stacked and the containers were single- wrapped in plastic. After the spill, the pallets were double- wrapped and single stacked.

[para17] By February 1992, the company had in place the recommended neutralizing agent to deal with a Miraclean spill. The company circulated a memo dated January 28, to appropriate employees outlining the use of the agent and proper steps for disposal.

[para18] The company marked the storm drains with fish symbols alerting employees to not flush chemicals into the drains.

[para19] The company spent $24,000 rebuilding drains and $47,000 on equipment to monitor acid/alkali levels of chemicals used in the plant.

[para20] There have been no further chemical spills which have resulted in damage to the environment.

The Crown Position

[para21] Crown Counsel, Mr. Cliffe, argues the company should be liable to pay $30,000 to $35,000. He suggests this be divided between a fine of $5,000 and a fish enhancement order under s. 79.2(f), a 1991 amendment to the *Fisheries Act*.

[para22] Mr. Cliffe says there was a lack of due diligence. The company failed to properly train and equip its employees to deal with this kind of spill. The failure to report the spill and the lack of Mr. Vallee or other senior supervisory staff having knowledge of the spill, he argues, are aggravating sentencing factors. He also points to a slow company response in taking curative steps. The chemical spill sign was not in place when Fishery Officer Gilbert visited the plant August 2. No neutralizing agent was in place until late January or February 1992.

[para23] Crown Counsel points out that Dairyland is a large, well-established, profitable company and has the ability to pay the suggested fine and fish enhancement amount.

[para24] He says the late guilty plea, entered on the first day of this scheduled 7 day trial is not a mitigating factor. The Crown had fully prepared its case which required a great deal of time and money.

The Defence Position

[para25] Mr. McNaughton, counsel for Dairyland, suggests that the company's liability should be $10,000, most of it an amount paid under a s. 79.2(f) fish enhancement order.

[para26] He argues that the small amount of chemical spilled and a lack of long-term effects should lead to a small fine and a modest s. 79.2(f) order to assist in the improvement of the fish habitat in Still Creek and tributaries.

[para27] Dairyland has been in business for 75 years. It has a good corporate reputation. This is the first and only time Dairyland has been guilty of this offence. The chemical, while harmful, was followed by appropriate safety precautions. The chemical spill warning signs went up within several weeks of the spill. The neutralizing agent took about 6 months to be put in place, but no harm resulted in this delay. Defence Counsel points to the full cooperation by the company through the plant manager, Mr. Vallee. After investigating, Mr. Vallee contacted the fisheries biologist with full particulars of the spill and provided a complete statement to the fishery officer on August 2.

[para28] Although the company failed to properly train its employees regarding the handling of this chemical spill, Mr. McNaughton stressed there was no profit motive connected with the spill.

[para29] He also filed corporate financial statements which show that while Dairyland has large gross sales, its net profit is relatively modest.

The Law

[para30] The blame worthiness involved in this offence, acknowledged by the company through its guilty plea is this: the company did not "...exercise all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system" *R.* v. *City of Sault Ste. Marie* (1978) 40 C.C.C. (2d.) 353 at 377 (SCC).

[para31] One of the leading sentencing cases dealing with environmental damage is Chief Judge Stuart's decision in *R.* v. *United Keno Hill Mines Ltd.* (1980) 10 C.E.L.R. 43 (Yukon TC). I agree with Stuart C.J. that each sentence is fact specific and that 1...pollution offences must be approached as crimes, not as morally blameless technical breaches of a regulatory standard," (page 47).

[para32] I find his sentencing criteria helpful and have used them in arriving at a fit sentence.

Discussion of Criteria

1) Nature of the Environment

[para33] The tributary and Still Creek are surrounded by both highly built-up urban development and a desirable wooded area adjoining Burnaby Lake Regional Park. It is not, at present, a high use area for public recreation. It is a minor fish habitat.

2) Extent of Injury

[para34] The damage inflicted was of brief duration and minor. There is no suggestion the chemical presented a continuing threat to the water and fish. After the initial fish kill, the chemical was further diluted in Still Creek and dispersed.

3) Criminality of Conduct

[para35] As stated earlier, this is a case of a lack of proper training of employees. The company did not take sufficient care to comply with the information provided by the Miraclean manufacturer - to neutralize the spill and keep it out of drains, sewers and surface water. There was no surreptitious violation. The company took an early step to prevent a recurrence. (It took further steps, but not as quickly as it might have.)

4) Extent of Attempts to Comply

[para36] The plant manager dealt appropriately with the Department of Fisheries, once the spill was brought to the manager's attention by the Department of Fisheries. The company has taken steps so employees now will know how to effectively respond to a chemical spill. The $71,000 spent on plant improvements will assist in dealing with any further spill. This shows, in a meaningful way, the company is serious about preventing recurrence of the offence.

5) Remorse

[para37] The personal appearance of corporate executives in court and...plans to avoid repetitions of such offence is another indication of genuine corporate contrition." (*R.* v. *United Keno Hill Mines* at p.49.) Three senior executives of the company were present in court throughout the one day sentencing hearing. The corporate decision to spend money shows a sincere desire to make this offence a onetime event.

6) Size of the Corporation

[para38] As the ability to pay a fine is a factor when sentencing an individual, so to is the profitability of the company. Dairyland, while large, does not have the same ability to pay a fine that a more profitable large company has.

7) Profits Realized by the Offence

[para39] It would have cost the company very little money to adequately train their employees and have a chemical neutralizing agent available prior to the spill. There was no profit made as a result of this failure.

8) Criminal Record

[para40] The company has no record for this offence or any other similar offence.

Decision

[para41] The lack of care shown by the company in failing to properly train and equip its employees was wrong. The failure to report the spill to the Department of Fisheries - such failure apparently based on a reporting breakdown in the company because of a lack of training -is also cause for censure.

[para42] However, the cooperation of the company with the Department of Fisheries' investigation afterward and the company's remedial steps - training, equipment, plant improvement - all reflect favorably on the company.

[para43] Based on my application of the sentencing criteria to the facts, I find a reasonable fine to be $5,000.

[para44] As a result of the spill, there was an immediate (but not long-term) harmful impact on fish and the waters frequented by them. Although I have reflected this in the amount of the fine, the effect of the chemical spill should also be a factor in a s. 79.2(f) order. The company, through its counsel has recognized this, in part, by suggesting most of any payment should be directed to fish habitat improvement.

[para45] I therefore direct that, in addition to the fine, the accused pay $10,000 to Her Majesty the Queen "...for the purpose of promoting the proper management and control of fisheries or fish habitat or the conservation and protection of fish or fish habitat", specifically the unnamed tributary to Still Creek which is the subject of this charge, Still Creek and other related waters.

NORTHWEST TERRITORIAL COURT

[Indexed as: R. v. Northwest Territories (Commissioner) #4]

Between Her Majesty The Queen in Right of Canada as represented by Environment Canada, and Her Majesty the Queen in Right of Canada as represented by the Commissioner of the Northwest Territories

Bourassa J.

Yellowknife, November 2, 1993

***Fisheries Act*, R.S.C. 1985, c. F-14, ss 36(3), 40(2), 79.2 – charge of depositing or permitting the deposit of a deleterious substance – sewage lagoon washed out – conviction at trial**

Sentencing – fine of $49,000 – order under s. 79.2 to pay Environment Canada $40,000 for marine life aquarium and programs to improve municipal sewage and waste treatment – changes to penalties in the Act create a new scale for sentencing – offence committed by a government should not be taken lightly – penalty should include a fine to compensate for costs of trial – order under s. 79.2 should relate to the offence committed

Summary: The accused government was charged and convicted at trial of contravening s. 36(3) of the *Fisheries Act* after the west dyke of the Iqualuit sewage lagoon washed out and 56,000 cubic meters of raw sewage washed into the Koojesse Inlet, which are waters frequented by fish.

This is a hearing on sentencing. The court reviewed changes to the *Fisheries Act* which increased fines for contraventions of the Act and authorized the courts to impose a variety of orders under s. 79.2 of the *Fisheries Act*. The result was a new scale to which sentencing principles must be applied.

The learned judge addressed the issue of whether the accused's status as a government should entitle it to special consideration. The court found that the opposite is the case; any breach of the law by a government is in effect a breach of trust and should not be taken lightly. In response to an order under s. 79.2 proposed by the Crown and agreed to in part by the defence, the court noted that there should be a fine to defray some of the costs of prosecution and that any such order should relate to the delict before the court. Mitigating factors included the defendant's lack of a previous record and the fact that the commission of the offence did not result from any active conduct. The defendant's costs in repairing and rebuilding the lagoon could not be taken into consideration. The major aggravating factor in this case was the defendant's complete failure to exercise due care and attention.

Held: Fine of $49,000 plus a payment order of $40,000 to be paid in trust to the Government of Canada for the Department of Environment, $20,000 to be used for a marine life aquarium in Iqualuit and $20,000 for research, studies and programs on improving municipal sewage and waste treatment in the Northwest Territories.

REASONS/MOTIF:

J. Cliffe and B. Webber, Counsel for the Crown
J. Donihee, R. Secord, D. Jenkins and P. Kennedy, Counsel for the Defense

REASONS FOR SENTENCING

[para1] The Defendant is to be sentenced for a contravention of Section 36(3) of the *Fisheries Act* over a period of ten days. After trial, the Defendant was convicted for an offence set out as follows:

> Count 3: Between the 1st day of June, A.D. 1991 and the 10th day of June, inclusive at the Iqaluit sewage lagoon, at or near the Municipality of Iqaluit, on Baffin Island, in the Northwest Territories, did unlawfully deposit or permit the deposit of a deleterious substance, to wit: sewage, in water frequented by fish, to wit: Koojesse Inlet, in violation of Section 36(3) of the *Fisheries Act* and did thereby commit an offence contrary to Section 40(2) of the *Fisheries Act.*

[para2] On June 1, 1991, the west dyke of the Iqaluit sewage lagoon washed out, releasing approximately 56,000 cubic meters, or 12.3 million gallons, of raw, untreated sewage and municipal waste directly into the waters of Koojesse Inlet, which are waters frequented by fish. This event occurred as a result of the Defendant's lack of due diligence.

[para3] I have set out the full facts in my Reasons for Judgment and will not repeat them here.

[para4] In any sentencing a balance has to struck in weighing the various factors that have been identified in jurisprudence. This balancing must be undertaken with a goal in mind. Until recently, in these kind of cases the goal has been deterrence. This goal has recently been re-articulated by the Canadian Sentencing Commission. Their approach has been adopted by the Ontario Court of Appeal in *R.* v *M. (G.)* (1992), 11 O.R. (3d) 225, where Abella J. cites the Commission's definition with approval:

> The fundamental purpose of sentencing is to preserve the authority of and promote respect for the law through the imposition of just sanctions, thereby contributing to the maintenance of a just, peaceful and safe society.

[para5] The principles to be taken into account are well known and I will not continue with yet another repetition of them. In particular, I acknowledge the considerations discussed in, inter alia, *R.* v. *City of Sault Ste Marie*; *Re Friends of the Oldman River*; *R.* v. *Gulf of Georgia Towing*; *R.* v. *United Keno Hill*; *R.* v. *Kenaston Drilling Ltd.*; *R.* v. *Echo Bay Mines Ltd.* (Ayotte TCJ); *R.* v. *Canada Marine Drilling Ltd.*; *R.* v. *Panarctic Oils Ltd.*; *R.* v. *Robinson's Trucking Ltd.*; *R.* v. *British Columbia*; *Canada* v. *Canada.*

SENTENCE RANGE

[para6] As a result of the amendments to the *Fisheries Act* of January 17, 1991, the sentencing parameters available have been broadened significantly. Firstly, the maximum fine for a single offence has been raised from $50,000 to $300,000.

> 40. (1) Every person who contravenes subsection 35 (1) is guilty of
>
> (a) an offence punishable on summary conviction and liable, for a first offence, to a fine not exceeding three hundred thousand dollars, and, for any subsequent offence, to a fine not exceeding three hundred thousand dollars or to imprisonment for a term not exceeding six months, or to both; or
>
> (b) an indictable offence and liable, for a first offence, to a fine not exceeding one million dollars and, for any subsequent offence, to a fine not exceeding one million dollars or to imprisonment for a term not exceeding three years, or to both.

[para7] Secondly, the Act now provides for a variety of Orders that may be against a Defendant.

> 79.2 Where a person is convicted of an offence under this Act, in addition to any punishment imposed, the court may, having regard to the nature of the offence and the circumstances surrounding its commission, make an order containing any one or more of the following prohibitions, directions or requirements:
>
> (a) prohibiting the person from doing any act or engaging in any activity that may, in the opinion of the court, result in the continuation or repetition of the offence;
>
> (b) directing the person to take any action the court considers appropriate to remedy or avoid any harm to any fish, fishery or fish habitat that resulted or may result from the commission of the offence;
>
> (c) directing the person to publish, in any manner the court considers appropriate, the facts relating to the commission of the offence;
>
> (d) directing the person to pay the Minister an amount of money as compensation, in whole or in part, for the cost of any remedial or preventive action taken by or caused to be taken on behalf of the Minister as a result of the commission of the offence;
>
> (e) directing the person to perform community service in accordance with any reasonable conditions that may be specified in the order;
>
> (f) directing the person to pay Her Majesty an amount of money the court considers appropriate for the purpose of promoting the proper management and control of fisheries or fish habitat or the conservation and protection of fish or fish habitat;

> (g) directing the person to post a bond or pay into court an amount of money the court considers appropriate for the purpose of ensuring compliance with any prohibition, direction or requirement mentioned in this action;
>
> (h) directing the person to submit to the Minister, on application by the Minister within three years after the date of the conviction, any information respecting the activities of the person that the court considers appropriate in the circumstances; and
>
> (i) requiring the person to comply with any other conditions that the court considers appropriate for securing the person's good conduct and for preventing the person from repeating the offence or committing other offences under this *Act*.

[para8] These changes in the law represent a major increase in the scope and severity of the sanctions that may be brought to bear against a defendant. Furthermore, these changes make many of the sentencing ranges indicated by other, earlier decisions of little assistance. This dramatic increase has been brought about by Parliament, no doubt to reflect the public's concern. These amendments reflect those concerns for the environment generally, and for fish and fish habitat specifically. In my view, it indicates a direction with respect to sentences: that significant sanctions be applied to achieve the purpose of the legislation.

[para9] In applying the law it is my view that the courts must be careful not to defeat the express intention of Parliament by a process of judicial nullification. Sentences must reflect many things: one of them must be the scale at which they are set by Parliament.

[para10] It is trite to note that the legislation provides for no minimum penalty. In a proper case, a minimal sanction could be imposed. It is also trite to state that the highest fine is reserved for the worst offender and the worst factual situation. These principles remain unchanged; however, in my view, the scale has been changed and those principles have to be applied on the new scale.

[para11] Recognizing that every offence and every offender is different, a mid-range offender and offence should expect financial sanctions in the $150,000 range. If this scale of sanctions is too severe, then the legislators, not the courts, should reduce the maximum and the scale.

[para12] Chief Justice Lamer stated in *Re Friends of Oldman River*:

> The protection of the environment has become one of the major challenges of our time.

[para13] The courts are constituted to apply the law. Under the rule of law, the courts are the protectors of the public welfare of the environment. The courts must meet the challenge. If the courts do not act, there is no one left to act.

THE NATURE OF THE DEFENDANT:

[para14] It is argued that, inasmuch as the Defendant is a Government, any fine or financial penalty is unnecessary and/or inappropriate, if not pointless. It is argued that a fine would amount to the transfer of the same tax payers' money from one government's consolidated revenue fund to

another's. It is suggested that, as governments operate "not for profit", financial penalties should be minimal.

[para15] In this vein, Perry Co. Ct. J. stated in *R.* v. *Quesnel* (City) [1987] BCJ:

> I am rather inclined to the view that one should be circumspect when you are dealing with a municipal corporation because the fact is it is the taxpayers who have to pay in cases of that kind.

[para16] In my respectful view, a more compelling argument may be made for the opposite perspective, that government Defendants should receive no special consideration. Indeed, that very fact may be taken in aggravation in the proper case.

[para17] Shaw J., in *R.* v. *British Columbia* 66 B.C.L.R. (2d) 84 makes it clear:

> Governments are much involved in many activities that can harm fisheries.

[para18] Governments can commit offences as readily as humans or corporations. They are not immune to breaking the law. For that reason only, the concepts of deterrence and encouraging respect for the law are just as relevant as they are to other kinds of defendants.

[para19] There is an additional element: our constitution is premised upon the goals of "Peace, Order and Good Government". We regularly charge our governments, at all levels, with duties and regulatory roles that we do not trust or want the private sector to undertake: health care, police, in some cases automobile insurance, pensions, unemployment insurance. The list is lengthy. It may very well be that we entrust governments with such duties because of the absence of the potentially corrupting profit motive or special interest consideration. We want to believe that governments will act in the broad public interest and not in a narrow selfish manner. We look to governments to protect us from incompetence or conduct compromising the public welfare.

[para20] If this hypothesis is correct, governmental conduct resulting in an offense against the law is not something that should be taken lightly. It is the antithesis of good government and arguably constitutes a breach of trust.

[para21] Distinguishing governments from other defendants is not without precedent. Dickson J. in *R.* v. *Sault Ste Marie* distinguished the powers and responsibility of government from large and small corporate contractors with these words:

> It must be recognized, however, that a municipality is in a somewhat different position by virtue of the legislative power which it possesses and which others lack. This is important in the assessment of whether the defendant was in a position to control the activity which it undertook and which caused pollution. (p. 377)

[para22] I am strengthened in this approach by the decision of the Court of Quebec in *Canada* v. *Canada* 10 CELR (NS). This case involved the destruction of lobster beds by government agents. In it, Decost J. states:

> In my humble opinion, the court must be much more severe when such a disaster is caused by agents of an arm of the Crown, since it is precisely the Crown on which the public relies to protect both the resource species and the environment.
>
> ...we believe that the fine should be set at $100,000; this fine is demanded by the need for general deterrence, and to make Public Works Canada employees take greater responsibility, in my humble opinion. (my emphasis)

ORDERS PURSUANT TO SECTION 79

[para23] Crown counsel has suggested that the court make a number of Orders pursuant to Section 79:

a) Publication pursuant to Section 79.2 (c) of the *Fisheries Act*;

b) Payment pursuant to Section 79.2 (f) of the *Fisheries Act* for the purpose of promoting the conservation and protection of fish or fish habitat in the Northwest Territories by:

1. Providing some or all of this money for the purposes of facilitating any studies and programs related to the improvement of municipal sewage and waste treatment in the Northwest Territories; and/or

2. Providing some or all of this money for the purposes of designing, constructing and operating a marine life aquarium at the Science Institute in Iqaluit. This aquarium would display local fauna for the purpose of educating the community about the complexity of the marine ecosystem, the diversity of marine life and the biological and social impact of man upon this ecosystem. Partners in this project would include the Department of Fisheries and Oceans, Department of Indian Affairs and Northern Development, and the Arctic College Environmental Technology Program; and/or

3. Providing some or all of this money to fund a community cleanup project for the banks of the Sylvia Grinnell River (lower 5 km. of the river towards its mouth) to remove barrels, construction waste, oil residue, scrap metal and other unsightly waste and potential contaminants.

c) By way of preventative/remedial Order, rebuild the sewage lagoon.

[para24] Except for the publication Order (which is resisted), the Defendant agrees that the suggested Orders would be an acceptable disposition from its point of view, provided, of course, that the total financial cost of implementing the Orders not be too substantial. The Defendant also points out that the sewage lagoon has already been rebuilt and an Order in that regard is not needed.

[para25] Counsel have referred me to a number of similar decisions arising from unreported cases in British Columbia. They are similar in that at the sentencing stage the Crown and Defence

both apparently negotiated and agreed upon joint representations for making specific Orders by way of disposition and sanction. Some courts, in turn, have endorsed those Orders.

[para26] I am not inclined to approach the sentencing of this Defendant in a similar manner for these reasons:

[para27] When the Sentencing Commission speaks of the sentence, it is of course speaking of a process that culminates with a sentence. The sentence is the final expression of the law. There is as much social utility in prosecution and conviction as there is in sentencing offenders. The whole process of enforcing the laws that reflect community values contributes to the acceptance of and respect for those values and the law. Want of enforcement diminishes respect for law which may give rise to cynicism and other negative attitudes about the rule of law. In other words, want of enforcement may bring the administration of justice into disrepute.

[para28] Prosecution may be a very expensive proposition, especially when the Defendant has extensive resources available to it. In this case the Defendant pleaded not guilty, as it was entitled to. Successful prosecution required witnesses from across Canada and many days of evidence. I have no doubt that a significant expense was incurred. The Defendant could have pleaded guilty and used that in mitigation. It chose not to.

[para29] One can easily foresee situations where prosecutorial officials may decide, or be compelled, not to prosecute obvious offenders simply because of the expense involved. That expense may be a function of the power and resources of the offender, undermining the concept of equal application of the law.

[para30] This is why in imposing sentence in this case generally, and in particular, in weighing the options before me of: a) endorsing jointly submitted orders; b) imposing a fine; or c) a combination of both, I am of the view that there should be a financial penalty by way of fine. The fine may then be used to defray some of the costs of prosecution.

[para31] In my view, Orders made pursuant to Section 72 (i) should be related to the delict before the court. Care must be taken not to impose requirements upon a Defendant that have little if anything to do with the events that bring it to court in the first place.

[para32] The power that Parliament has given Courts must be exercised judicially and carefully and not as a blank cheque for an environmental wish list. It is with this in mind that I choose not to order the Defendant to clean up a nearby river as laudable as the project may be.

[para33] A publication Order pursuant to Section 79 would normally be appropriate. It appears that publicity with respect to a conviction is an anathema to the people that carry on business sheltered behind a corporate shell. Public announcement of their corporate offences, or their role, is to be avoided. This may well stand as proof in itself of the deterrent value of such publication. In this case the media has taken an interest and there has been ample publicity to date. I feel that any Order by me will be redundant, however, that may not always be the case. Most trials escape the attention of the media, and in those cases a publication Order will surely be appropriate.

[para34] The Defendant argues that the $300,000 plus the cost of repairing and rebuilding the lagoon may properly be taken into consideration in determining sentence. I disagree. It was the Defendant's duty to provide the facility involved. To get credit for repairing what it did not build or maintain properly in the first place would be to encourage incompetence, if not defeat the very purpose of the legislation.

[para 35] As Ayotte, TCJ stated in *R.* v. *Echo Bay Mines Ltd.* 3 F.P.R. 47:

> Similarly, while the response to the spill and the subsequent plans and efforts to upgrade and change the fuel handling system show a serious concern to prevent any future occurrences such as this, they are after the fact as it were. The legislation is not intended to encourage compliance after the environmental mishap but rather to demand compliance before those mishaps occur so as to prevent them. (my emphasis)

FACTUAL ASPECTS

[para36] In mitigation, I acknowledge that the Defendant has not been convicted of any prior offences.

[para37] This event did not come to pass as the result of the conscious or active conduct of the Defendant such as in *R.* v. *Panarctic Oils Ltd*. Here, the Defendant simply - as far as I can determine - abandoned its responsibility. The lagoon with all its problems was forgotten. While the result of offences of omission or commission may well be the same, in my view under the general heading of Criminality of Conduct, the latter case is usually more aggravating.

[para38] However, there is a major aggravating feature with respect to the facts of this case. As stated, the Defendant's failure to exercise due care and attention was virtually absolute. There was little in the evidence that might be considered as the exercise of due care and attention. Notwithstanding its public duty in this regard, the existence of the sewage lagoon and dyke were wholly absent from the Defendant's consciousness. This is aggravated significantly when one considers that: a) the lagoon had a long and recent history of problems; the dyke had failed five times in ten years; and b) that the Defendant had the policy, the necessary engineering and scientific studies, the management and operational guidelines all in hand that, if applied, would have prevented the offence.

SENTENCE

[para39] For these reasons I have determined to sentence the Defendant using a combination of fine and an Order contemplated by Section 79, taking the total effect into account.

[para40] For the events of June 1, 1991:

Fine ....$ 40,000

For each day of seepage due to faulty repair - $1,000 x 9: Fine 9,000

By way of Payment Order 40,000

[para41] This represents, in total, a penalty of $89,000 for the Defendant's default.

[para42] The Payment Order is as follows:

Pursuant to Section 79.2 (f) of the *Fisheries Act*, I order the Defendant to pay the sum of $40,000 in trust to the Government of Canada for payment to the Department of Environment, (Environment Canada) District Accounting Office, Box 2970, Yellowknife, Northwest Territories X1A 2L2, for the purpose of promoting the conservation and protection of fish or fish habitat in the Northwest Territories by:

1) allocating $20,000 of this sum for the purposes of designing, constructing and operating a marine life aquarium at the Science Institute, Iqaluit, N.W.T. This aquarium is to serve as a focal point for research and study of marine life and to promote related educational objectives. This project of the Department of Environment may be in partnership with the Department of Fisheries and Oceans, the Department of Indian Affairs and Northern Development, and the Arctic College Environmental Technology Program.

2) providing the balance of the funds remaining, $20,000, together with accrued interest, to facilitate, in whole or in part, any studies, research or programs directly related to the improvement of municipal sewage and waste treatment in the Northwest Territories.

ONTARIO COURT OF JUSTICE – GENERAL DIVISION

[Indexed as: R. v. Oliver, Mangione, McCalla and Associates]

Between Her Majesty The Queen, Appellant, and Oliver, Mangione, McCalla and Associates, Agrodrain Systems Limited, Robert J. Wielgut, R.J. Nicol Homes Limited, Respondents

Charron J.

Ottawa, November 18, 1993

***Fisheries Act*, R.S.C. 1985, c. F-14, s. 35(1) – charge under s. 35(1) of unlawfully carrying out work – over 2 years after first appearance charges stayed for not being tried in a reasonable time – no evidence of prejudice – stay removed – returned to provincial division for trial on expedited basis**

***Charter of Rights and Freedoms*, s. 11(b) – corporate accused entitled to right to be tried in a reasonable time – corporate accused cannot rely on presumption of prejudice from a lengthy delay – must introduce evidence that its fair trial interest has been irremediably prejudiced**

Summary: The appellants were charged under s. 35(1) of the *Fisheries Act* with unlawfully carrying on work that resulted in the harmful alteration of the fish habitat and under s. 13(a), s-s 1(d) of the *Public Lands Act* with causing shore lands to be dredged without a work permit. The charges were laid on August 9, 1989 and September 12, 1989 and the respondents first appeared in court on September 26, 1989 at which time they entered not guilty pleas. The trial was set for January 17-18, 1990 and evidence was heard on that date, but various adjournments, appeals and other events caused delay. On December 12, 1991, the learned Justice of the Peace granted a motion to stay the charges pursuant to s. 11(b) of the *Charter of Rights and Freedoms* on the ground that it would be contrary to the basic concept of justice for the court to permit the cases to continue.

On appeal, the court confirmed that the principles in *R.* v. *Askov* with respect to the right to be tried within a reasonable time apply to a corporate accused, namely length and explanation of the delay and waiver and prejudice of the accused. However, following the principles set out in the subsequent case of *CIP* v. *The Queen*, a corporate accused cannot rely on the presumption of prejudice based solely on very long delays. There must be evidence of irremediable prejudice. No evidence was entered showing such prejudice. Although the *CIP* case was decided after the decision appealed from, the respondents did not seek to introduce evidence on the appeal to show prejudice.

Held: Appeal dismissed.

REASONS/MOTIF:

Stephen March, Counsel for the Appellant

Keith MacLaren, Counsel for the Respondents, Agrodrain Systems Limited, Robert J. Wielgut
Roydon Kealey, Counsel for the Respondents, Oliver, Mangione, McCalla and Associates Ltd.

[para1] CHARRON J.:-- The Attorney General of Canada appeals from an Order staying an information against the respondents alleging that offences were committed contrary to the *Fisheries Act* R.S.C. 1985, c. F-14. A stay of proceedings was entered by a Justice of the Peace on December 12, 1991 on the ground that the respondents had not been tried within a reasonable time as guaranteed by s. 11(b) of the *Charter of Rights and Freedoms*.

[para2] The respondents were charged on August 9th, 1989 and September 12th, 1989 with offences under s. 35(1) of the *Fisheries Act* whereby it was alleged that they unlawfully carried on work that resulted in the harmful alteration of the fish habitat. The incidents that gave rise to these charges occurred between April 25th, 1985 and June 2nd, 1989 and between August 11th, 1989 and September 9th, 1989. The respondents were also charged with offences under the *Public Lands Act* s. 13(a) s-s. 1(d) in which it was alleged that they caused shore lands to be dredged without the authority of a work permit. The incidents that gave rise to these charges occurred between July 14th, 1989 and July 24th, 1989. The history of the proceedings is of relevance to this appeal and can be summarized as follows:

Sept. 26/89 The respondents first appeared in Court on these charges. The Crown indicated its intention to proceed summarily and the respondents agreed to be tried together on all charges under both the *Fisheries Act* and the *Public Lands Act*. The respondents entered not guilty pleas and the matter was set for trial for two days for January 17th and January 18th, 1990. On this first appearance, the respondents indicated that more than two days would be required for trial and notwithstanding this assessment, only two days were set at that time.

Jan. 17-18/90 Evidence was heard on both days at the end of which all parties agreed that the trial would take at least another three days. As a result, the matter was adjourned for continuation on March 7, 1990.

Mar. 7/90 The Crown closed its case against the respondents, at which time a motion for a directed verdict was brought by the respondents. The motion was argued on March 7th and 8th, 1990 following which the Justice of the Peace reserved her decision and scheduled the matter for continuation on May 25th, 1990.

May 25/90 The Justice of the Peace granted the respondents' motion with respect to the charges under the *Public Lands Act* and dismissed all charges under that statute. She also dismissed the charges under the *Fisheries Act* with respect to some of the respondents. She denied the motion with respect to the *Fisheries Act* charges against the respondents concerned on this appeal and a new date was set for the continuation of the trial for August 23rd, 1990. Following this date, the Attorney General for Ontario commenced an appeal in relation to the decision dismissing the *Public Lands Act* charges.

Aug. 23/90 As a result of the pending appeal, the respondents requested that the matter be adjourned to allow the appeal to be heard before they were called upon to call evidence in their defence. The Crown consented to that request. The request was denied by the Justice of the Peace whereupon all respondents, save and except R.J. Nicol Construction and R.J. Nicol Homes Ltd. indicated that they wished to bring an application for prohibition. As a result, the trial was adjourned to November 15th, 1990 in order to allow the prohibition application to be brought.

Nov. 6/90 Mr. Justice Chilcott of this Court granted an Order prohibiting the Justice of the Peace from continuing the trial under the *Fisheries Act* until such time as the appeal of the *Public Lands Act* charges was heard or abandoned.

Jan. 8/91 The appeal with respect to the dismissal of the *Public Lands Act* charges was heard and the decision was reserved.

Apr. 10/91 A decision to dismiss the Crown's appeal was released on that date.

May-Aug./91 On May 9th, 1991 the Attorney General for Canada wrote to counsel for the respondents advising that the Justice of the Peace was not authorized to hear federal offences under the particular section of the *Fisheries Act* and raised the possibility of laying a new information. There followed in the ensuing months correspondence between the parties with respect to this issue and a date was finally set to appear before the Justice of the Peace on August 30th, 1991.

Aug. 30/91 A date was set by the Justice of the Peace for the continuation of the trial on December 12th and 13th, 1991.

Dec. 12/91 It was confirmed at that time that the Justice of the Peace now had the jurisdiction to hear the particular matter and without prejudice to their right to bring a motion for a stay under s. 11(b) of the Charter, the respondents agreed that the charges be re-read and that the evidence already heard by the Justice of the Peace would apply. Following this, they brought a motion seeking a stay on the ground that they had not been tried within a reasonable time. The Justice of the Peace granted the motion and the Crown hereby appeals this decision.

The Justice of the Peace gave the following reasons for her ruling:

> In reply to the motion by defence counsel of *R.* v. *Askov*, I agree with counsel in that Ottawa and Winnipeg are comparable cities relating to the length of time for setting trial dates. As we all know, the approximate length of time in this area is six months for most cases.
>
> *R.* v. *Askov* indicates certain factors to be taken into consideration in the time delay, i.e., the length of delay, the reason for delay, including the Crown's conduct, systemic and institutional delay, and the complexity of the cases in question. Waivers, the onus rests very clearly on the Crown to demonstrate that any waiver is made unequivocally and with full knowledge of the consequences. And, finally, if the rights of the accused have been violated pursuant to the Charter.
>
> I look at the case before the court today sworn to in August and September, '89, returnable September 26th, '89; date set for January 17th and 18th, 1990.

> Obviously, not enough time for the ensuing trial, and it goes on. It's related and chronologically introduced by Mr. MacLaren.
>
> We've all played our parts in this twenty-seven to twenty-eighth month delay. The Crown in not setting sufficient time for trial, the length of time taken for the appeal, defence counsel in the Motion of Prohibition, which, of course, they're perfectly entitled to, and the fault also lies with the court, my unavailability for vacations, the lack of court space, the lack of time, so we all contributed in this lengthy delay. It's a little bit more than systemic or institutional delay.
>
> Then, I approach the final concept, 'Has the accused's rights been violated?' September 26, Mr. Vice indicated, "Your Worship, my clients need a date as soon as possible, they cannot have this hanging over their heads."
>
> Bearing these remarks in mind, and looking at the dates of August-September, '89, and today's date, December 12th, 1991, and taking all the aforementioned facts into consideration, I feel it would be contrary to the basic concept of justice for this court to permit these cases to continue. It would be a direct violation of their Charter rights.
>
> I also feel, however, that the matter of my jurisdiction, lost or gained, has no bearing at all in the matter, nothing was saved, nothing was lost, and, accordingly, these proceedings are Stayed. Thank you.

[para3] The determination of this appeal rests upon a consideration of the principles set out in the subsequent case of *CIP* v. *The Queen* (1992), 71 C.C.C. (3d) 129 S.C.C. on the question of prejudice and the corporate accused. In *CIP Inc.*, the Supreme Court of Canada confirmed that a corporate accused has the right to be tried within a reasonable time pursuant to s. 11(b) of the *Canadian Charter of Rights and Freedoms*. The factors as set out in *R.* v. *Askov* (1987), 37 C.C.C. (3d) 289 must be considered: the length of the delay, the explanation of the delay, waiver and prejudice of the accused. In *Askov*, the Court found that prejudice may be inferred or it may be proven. In cases of very long delays "an often virtually irrebuttable presumption of prejudice to the accused " would result from the passage of time. It was argued in *CIP Inc.* however that a corporate accused could not rely on the presumption of prejudice resulting from a long delay since the inference of prejudice was linked to the liberty and security interests of an accused, not the fair trial interest. The Supreme Court of Canada reviewed the concerns expressed in *Askov* which led to an inference of prejudice and, with the exception of legal costs, found those of no relevance to corporations. The Court concluded as follows at p. 144:

> In order properly to assess the reasonableness of delay, a court has to balance the various interests at stake. The interests of the accused must be weighed against the interest of the community in ensuring that those who have allegedly transgressed the law are brought to justice. The balancing process must be fair. There is no room for artificiality. It seems to me that allowing a corporation to rely upon a presumption of prejudice would offend that principle. It is therefore my opinion that with respect to this fourth factor, a corporate accused must be able to establish that its fair trial interest has been irremediably prejudiced.

> I use the phrase "irremediably prejudiced" because there are some forms of prejudice that a court can remove, notably by making specific orders regarding the conduct of the trial.

[para4] On December 12, 1991, the respondents relied on the presumption of prejudice resulting from the lengthy delay of some 27 months since the laying of the charge. The stress resulting from the pending trial and the ensuing costs were noted in particular. With respect to the respondent Oliver, Mangione, McCalla and Associates in particular, a firm of professional consulting engineers, it was noted that the notoriety of the trial had an "incalculable" impact on their reputation. It was noted as well that the Crown had had the opportunity to present its evidence at a defence would be forced to present its evidence some two years after the event if the trial were to proceed on that date.

[para5] The respondents have essentially made the same submissions on this appeal with respect to prejudice and have not sought to introduce any new evidence. In addition, they point to the fact that the tape of the proceedings of September 26, 1989, when the respondents first appeared in court to set a date for trial, is no longer available. This tape was available at the time of the application on December 12, 1991 and the Justice of the Peace listened to it. She noted in her decision that the defendants had requested an early date for trial since they did not want the charge hanging over their heads.

[para6] I am unable to find in the record any evidence that the respondents' "fair trial interest has been irremediably prejudiced" as required by *CIP Inc.* nor is there any indication that the missing tape of September 26, 1989 referred to any such matter. Indeed, it couldn't have since there had not yet been any effect of the passage of time on the fairness of the trial at that point. The only point raised before the Justice of the Peace which touched on the fairness issue was that the defence would be forced to present its evidence some two years later than the Crown at a time when memories would no longer be fresh. Of course, this would not be the case at a second trial where all of the evidence could be called during the same period of time and consequently, it cannot be said the fair trial interest is "irremediably" prejudiced.

[para7] Of course, the Justice of the Peace did not have the benefit of *CIP Inc.* at the time she made her ruling and in other respects it cannot be said that she erred in principle. I have the benefit of this subsequent case and I am bound by it. The respondents argue that the application of these principles at this point in time would amount to a retroactive application of the law. Not so, since they could have sought to introduce evidence on the appeal to show the existence of the kind of prejudice which must be proven. They have not sought such leave and indeed have made no reference at all in their submissions to any matter which would suggest the existence of such evidence.

[para8] In the absence of some evidence of prejudice establishing that the respondents' fair trial interest had been irremediably prejudiced, I must conclude that the stay was entered in error. The appeal is allowed, the stay is removed. The matter is remitted to the provincial division for a trial to proceed on an expedited basis.

BRITISH COLUMBIA COURT OF APPEAL

[Indexed as: R. v. Rivtow Straits Ltd. (c.o.b. Pacific Rim Aggregates)]

Between Regina, Appellant, and Rivtow Straits Limited, carrying on business as Pacific Rim Aggregates, Respondent

Hutcheon, Southin and Prowse JJ.A.

Vancouver, December 13, 1993

***Fisheries Act*, R.S.A. 1985, c. F-14 – s. 36(3) deposit of a deleterious substance in a water body frequented by fish – Crown appeal of acquittal – appeal dismissed – definition of "permitting" – particularized wording of Information must conform with relevant section of the Act.**

Summary: This is an application by the Crown to appeal an acquittal of the Respondent from conviction of a charge of depositing a deleterious substance in water frequented by fish under the *Fisheries Act*, R.S.C. 1985, c. F-14.

The Respondent was charged with two counts under s. 36(3) of the *Fisheries Act*: (1) with depositing a deleterious substance to wit: oil in water frequented by fish ..., and (2) permitting the deposit of a deleterious substance to wit: oil in water frequented by fish. The trial judge found as a matter of fact that there was insufficient evidence that the oil in the creek was from the Respondent's activities and the Respondent was acquitted on the first count. The trial judge convicted the Respondent on the second count on the basis that even if the Respondent was not the polluter, it failed to prevent an occurance which it should have foreseen and that it provided the opportunity for the pollution to take place even if it did not control the pollutant.

On appeal by the Respondent the summary conviction appeal justice reversed the conviction on the second count. The learned justice found that the element of control is essential in the definition of "permit" and that the Respondent did not have any authority or control the pollution by the neighboring company.

On further appeal to this court, the majority found for the Respondent based on the wording of the second count. Since the wording of the Information is particularized in accordance with s. 34(1)(a) of the *Fisheries Act*, and because it is was accepted that the place where the oil was deposited is other than Shannon Creek, the Respondent cannot be convicted of the offence in count 2 as the Respondent cannot be said to have any control over property occupied by another party where the deposit occured.

A dissenting judgement on appeal found that the definition of "deposit" in the *Fisheries Act* includes both "leaking" and "seeping" which can occur by inaction. Accordingly, the facts would support a conviction on the second count.

Held: The Crown's appeal was dismissed.

REASONS/MOTIF:

C. Stolte, Counsel for the Appellant
R.J. Kaardal and J. Lysyk, Counsel for the Respondent

[para1] SOUTHIN J.A.:-- This is an application by the Crown for leave to appeal and, if leave be given, an appeal by the Crown from the acquittal on 14th January, 1992, by Huddart J., sitting as a summary conviction appeal court, of the respondent on the second count of a two count information:

> RIVTOW STRAITS LIMITED, carrying on business as PACIFIC RIM AGGREGATES On or about the 21st day of November, 1989, at or near Shannon Creek, Sechelt, in the Province of British Columbia,
>
> * * *
>
> Count 2: Did permit the deposit of a deleterious substance to wit: oil in a place under conditions where the deleterious substance to wit: oil may enter water frequented by fish, to wit: Shannon Creek,
>
> Contrary to Section 36(3) of the *Fisheries Act*

[para2] By reasons for judgment delivered the 12th April, 1991, Giroday P.C.J. had convicted the respondent on that count, but acquitted on the first count:

> Count 1: Did deposit a deleterious substance to wit: oil in water frequented by fish to wit: Shannon Creek,
>
> Contrary to Section 36(3) of the *Fisheries Act*

[para3] We were offered no explanation for the Crown's failure to bring this appeal on for hearing with more expedition.

[para4] The relevant statutory provisions are these:

> *Fisheries Act*, R.S.C. 1985, c. F-14:
>
> 34.(1) For the purposes of sections 35 to 43, "deleterious substance" means
>
> (a) any substance that, if added to any water, would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water, or
>
> (b) any water that contains a substance in such quantity or concentration, or that has been so treated, processed or changed, by heat or other means, from a natural state

> that it would, if added to any other water, degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water,...

> "deposit" means any discharging, spraying, releasing, spilling, leaking, seeping, pouring, emitting, emptying, throwing, dumping or placing;
>
> "fish habitat" means spawning grounds and nursery, rearing, food supply and migration areas on which fish depend directly or indirectly in order to carry out their life processes;
>
> "water frequented by fish" means Canadian fisheries waters.

* * *

> 36. (3) Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any such water.

[para5] Because one branch of Mr. Kaardal's submission is founded on what he says was the course of the trial, I must give a brief account of that trial.

[para6] The Crown did not open and the appellant did not ask for particulars.

[para7] The first and principal Crown witness, J.A. Morrison, a Fisheries Officer, described going to a parcel of land near Shannon Creek, which parcel was partly under the management and control of B.A. Blacktop Ltd. and partly under the management and control of the appellant and upon which was a drainage system which debouched into Shannon Creek.

[para8] Mr. Morrison produced a series of photographs and identified the various buildings and parts of the drainage system shown thereon and explained under whose management and control each part was. He then produced a diagram of the drainage system:

[para9] The arrows show the flow through the system as established by a dye test.

[para10] He identified the oil barrel shed and the oil soaked ground and the fuel tank on stilts as being within the control of Rivtow and the asphalt plant as being within the control of B.A.

[para11] He described taking samples of water from various parts of the system.

[para12] As to sample 4, he testified:

> Q. The area from which sample 4 is taken, could you describe that area?

A. Sample 4 was a pool adjacent to the shop. It was -- appeared to be a great deal of contamination on the surface of the pool at that point and by a great deal, I would mean that there was between half an inch and an inch of what appeared to be petroleum products sitting on the top of the pool in that immediate vicinity. Also this is what I would refer to as the main collecting pool as on the basis of my dye test work, all the material from the contaminated area -- the site ended up draining into this pool before it exited another culvert towards the drainage ditch that leads off site.

* * *

Q. In the area of -- from which sample 4 was taken, did you understand that area and he shop adjacent to it, to be under the management and control of Rivtow Straits Ltd.?

A It was my understanding that it was under the management and control of Pacific Rim Aggregates. At that time, I did not know the corporate relationship between Pacific Rim Aggregates and Rivtow Straits.

Q. The -- on the basis of the dye testing you did, did you observe dye that had arrived at or was placed in the pool from which sample 4 was taken, to make it's way to Shannon Creek?

A. Yes, I did.

[para13] He described also the taking of sample 7 at the mouth of a culvert entering pond "H" - "J".

[para14] The next witness, Jezdimir Rankovic, an analytical chemist, whose report as to all the samples and what he found in them was filed, said as to sample 4:

Q. In -- with respect to sample number 4, you make reference to -- you say "plus other markings, nearly full, containing a liquid with two phases; one upper phase black heavy textured liquid and one lower phase clear liquid." What do you mean by the

A. That's correct.

Q -- reference to phases?

A. Two phases meaning that the -- there are two liquids present in the sample 4 was a lighter liquid which was in a form of emulsion on the top of the clear liquid which is the lower liquid. And there was the upper phase was the emulsion of oil and possible water, of course, and the lower clear liquid was water. Water with some suspended possible.

[para15] His report on this sample said:

> The upper phase of sample #891168-4 provided "FID-GC" patterns characteristic of a "DIESEL" type fuel with a hydrocarbon range from about nC11 to nC23 and a "LUBRICATING" type oil with a hydrocarbon range from about nC24 to nC38.

[para16] His evidence as to sample 7 was that it contained no detectable petroleum hydrocarbons.

[para17] The Crown called four other witnesses, Messrs. Tancock and Squire, both Fisheries Officers, Mr. E.G. Lucas, Rivtow's superintendent, and Mr. J.C. Nanson, the manager of the Sechelt division of B.A. Blacktop. It is unnecessary to make any further reference to the evidence of Mr. Squire who was not present on the site on the day charged in the information.

[para18] The other witnesses gave evidence concerning pool "C" and the Rivtow fuel storage tank shown at the top of the diagram:

Mr. Tancock (Fisheries Officer):

Q. Okay. Did you observe in -- in or about the shop in either of those pools any fish?

A Yes, in the pool that's by the one labelled C I also observed small fish, in the neighbourhood of about two inches. I didn't get a look at it. The oil was so thick on the surface of the water there that I saw it and then it scooted off in underneath the sheet of the oil and I could not see it after that, but I observed a fish in that pool as well.

Mr. Lucas (Rivtow's Superintendent):

Q. The ditch system from 'L' to 'M' and from 'M' -- well, let's just use 'L' to 'M' that was under the management of Pacific Rim?

A. Yes.

Q. Okay, and the -- and the pool on the -- to the right of the shop, that was under the management of Pacific Rim?

A. Yes.

* * *

Q. The -- the culvert or the pipe between 'C' and 'D' who managed that?

A. It was under Pacific Rim's jurisdiction, yes.

Q. Okay, the -- and the system after the pipe from -- from 'D' towards Shannon Creek, was that under the management of Pacific Rim?

A. Yes.

Q. As at November of 1989?

A. Yeah.

* * *

Q. Now in the course of your -- the time that you were superintendent on that site, most particularly, in or about the area of November, 1989, did you ever observe oil on the surface of any water in -- that forms part of the drainage system?

A. Yes.

Q. And where would you have observed that at?

A. In the ditch by B.A. and in the pond beside our shop.

Q. Okay. The pond beside your shop being that the pond, if I could have figure three again, Exhibit two, I believe, where you --

A. It's the large pond on the right-hand side.

Q. Okay. The large pond that's here.

A. This pond here had oil on the surface of it.

Q. Okay, designated as 'C'.

Mr. Nanson (B.A. Blacktop's Sechelt Manager):

Q. The area shown in photograph eleven, that is beside the shop, maintenance shop, of -- of Rivtow.

A. Yes.

Q. And that area was under the management of Rivtow? A I believe so, yes.

The Court Sorry, what number was that?

Mr. Fairweather: Number eleven.

The Court: Thank you.

Mr. Fairweather:

Q The area shown in photographs fourteen and fifteen, do you know where that is located?

A. That's the -- if you're taking a face view on the maintenance shed of Rivtow's, it's to the righthand side.

Q. That area was under the management of Rivtow?

A Yes.

Q. Now we're referring to photograph twenty-four, the tank that's shown on the stilts there, whose tank is that?

A. It was Rivtow's diesel fuel storage.

Q. And the person who - - you see where the person is standing in the area of that tank, have you ever observed oil in what appears to be water under or adjacent to that tank?

A. Yes.

Q. Did you observe oil in -- in that -- in that area on or about November 21st of 1989?

A. Yes.

[para19] Having recounted the evidence at some length, the learned judge concluded her reasons thus:

> Mr. Morrison felt that material from the contaminated area, starting at least with pool "K" drained into pond "C" and thence through the system into Shannon Creek. His opinion was that there had been a chronic discharge of contaminations at the Rivtow site rather than a one-event spill, and that given the nature of the creek, there would be no opportunity for the fish to avoid the contamination.
>
> Defence counsel points out that there was no sample taken directly from pool "H" - "J", the pool directly below and nearest "G", and that the first contamination found after "G" in the system was in "K", the pool directly below "H" - "J". Nor was there a sample taken of the apparently oil soaked ground outside Rivtow's shed. There is no direct evidence that oil from pool "G" got into the ditching system. The dye made its way from "G" to the system despite the lack of pipe or ditch connection, obviously by seepage through the berm. It is not, however, established that oil would similarly have passed through the berm and indeed Mr. Lucas' evidence is to the contrary.
>
> On a consideration of the evidence herein, some of which I have summarized, I conclude as follows:

(a) the substance found in Shannon Creek by Fisheries Officer Squire on November 21, 1989 was oil, probably lubricating oil mixed with a diesel type fuel;

(b) that oil was a "deleterious substance" as defined in section 34 (1a) of the *Fisheries Act*;

(c) Shannon Creek is "water frequented by fish" as defined in Section 34 of the *Act*, being "Canadian Fisheries Waters", which phrase is further defined in Section 2 of the *Act* as including "all internal waters of Canada";

(d) the oil came from Rivtow's site via the drainage system controlled in part by Rivtow and in part by BA;

(e) there is insufficient evidence to determine whether it was oil from Rivtow's activities which was found in Shannon Creek, as opposed to oil from BA's activities;

(f) it is not established that Rivtow did "deposit" the deleterious substance, oil, within the meaning of "deposit" in Section 34 of the *Act*, which implies a direct activity resulting in pollution.

With respect to count 2: "permit" or "permit the deposit of" is not defined in the *Act*. The verb "permit" is defined in Black's Law Dictionary 5th Edition 1979 at page 1026 as "to suffer, allow, consent, let; to give leave or license; to acquiesce, by failure to prevent..." In the Concise Oxford Dictionary 6th Edition 1976 page 822 "permit" is defined inter alia as "give opportunity". The "permitting" aspect of the offence centres on a defendant's passive lack of interference, or its failure to prevent an occurrence which it ought to have foreseen. (*R.* v *VESPRA (TOWNSHIP*) 9 WCB (2nd) p. 166 (Ont.))

(g) assuming in favour of Rivtow that BA oil was the pollutant herein, Rivtow failed to prevent an occurrence which it ought to have foreseen. Its plant superintendent knew of BA's spillages, at least in 1988, and no effective steps were taken to prevent or at the very least contain the spillages. Rivtow constructed the site or a considerable portion thereof; BA was simply a sub-tenant from Rivtow;

(h) further, the portion of drainage system controlled by Rivtow downstream from BA's area made possible the pollutant's entry into Shannon Creek. The danger should have been obvious to Rivtow's employees. Rivtow clearly provided the opportunity for the pollution to take place even if it did not in fact control the actual pollutant.

(i) with respect to count 2, the Crown has established the actus reus and the defendant has not established reasonable care or due diligence on its part.

[para20] In speaking of the actus reus, the learned judge was only doing what her hierarchical betters do all the time. But for my part, I am in agreement with Lord Diplock who, in *R.* v. *Milier*,

[1983] 1 All E.R. 978 at 979, referring to a question put to the House of Lords concerning "the actus reins of the offence of arson", said:

> The question speaks of 'actus reus'. This expression is derived from Coke's brocard (3 Co Inst ch I, fo 10), 'Actus non facit reum, nisi mens sit rea', by converting incorrectly into an adjective the word reus which was there used correctly in the accusative case as a noun. As long ago as 1889 in *R* v. *Tolson* 23 OBD 168 at 185-187, [1886-90] All ER Rep 26 at 36-37 Stephen J when dealing with a statutory offence, as are your Lordships in the instant case, condemned the phrase as likely to mislead, though his criticism in that case was primarily directed to the use of the expression 'mens rea'. In the instant case, as the argument before this House has in my view demonstrated, it is the use of the expression 'actus reus' that is liable to mislead, since it suggests that some positive act on the part of the accused is needed to make him guilty of a crime and that a failure or omission to act is insufficient to give rise to criminal liability unless some express provision in the statute that creates the offence so provides.
>
> My Lords, it would I think be conducive to clarity of analysis of the ingredients of a crime that is created by statute, as are the great majority of criminal offences today, if we were to avoid bad Latin and instead to think and speak (as did Stephen J in those parts of his judgment in *R* v *Tolson* to which I referred at greater length in *Sweet* v *Parsley* [1969] 1 All ER 347 at 361, [1970] AC 132 at 162-163) about the conduct of the accused and his state of mind at the time of that conduct, instead of speaking of actus reus and mens rea.

[para21] In agreeing with Lord Diplock, I would not wish to be taken as denigrating the study of Latin, the disappearance of which from our educational institutions I deplore.

[para22] I point out that there is nothing at all in the record to indicate that the Crown's case on the first count was founded on the proposition that the "deposit" by B.A. was in law "deposit" by Rivtow or that the Crown's case on the second count was limited to an assertion that the respondent ought to have prevented B.A. from putting any oil into the system.

[para23] In subparagraph (g) of her reasons, the learned trial judge said "no effective steps were taken to prevent or at the very least contain the spillages" and in sub-clause (h), she said, "further, the portion of drainage system controlled by Rivtow downstream from BA's area made possible the pollutant's entry into Shannon Creek".

[para24] The respondent appealed, giving these grounds:

1. Her Honour Judge Giroday erred by finding that the Crown proved that Rivtow committed the actus reus of the offence.

2. Her Honour Judge Giroday erred in law by ruling:

   > "(g) assuming in favour of Rivtow that BA oil was the pollutant herein, Rivtow failed to prevent an occurrence which it ought to have foreseen. Its plant superintendent knew of BA's spillages, at least in 1988, and no

> effective steps were taken to prevent or at the very least contain the spillages. Rivtow constructed the site or a considerable portion thereof; BA was simply a sub-tenant from Rivtow;
>
> (h) further, the portion of drainage system controlled by Rivtow downstream from BA's area made possible the pollutant's entry into Shannon Creek. The danger should have been obvious to Rivtow's employees. Rivtow clearly provided the opportunity for the pollution to take place even if it did not in fact control the actual pollutant.
>
> > (i) with respect to count 2, the Crown has established the actus reus and the defendant has not established reasonable care or due diligence on its part."

3. Her Honour Judge Giroday erred in law in finding that the defendant did permit the deposit of a deleterious substance: to wit, oil, after having found that all of the oil may have come from B.A. Blacktop and that the defendant did not control the oil and did not deposit the oil.

4. Her Honour Judge Giroday erred in finding that:

> "The portion of drainage system controlled by Rivtow downstream from BA's area made possible the pollutant's entry into Shannon Creek and that the danger should have been obvious to Rivtow's employees and that Rivtow clearly provided opportunity for the pollution to take place even if it did not in fact control the actual pollutant."

[para25] As she was bound to do, Huddart J. accepted the learned Provincial Court judge's findings of fact.

[para26] Huddart J. began her reasons by saying that the appeal "concerns the meaning of the word 'permit'..."

[para27] She noted that the respondent did not seek to avail itself of the defence of due diligence, nor did it dispute - as indeed it could not - any of the learned trial judge's findings of fact.

[para28] As I understand her reasons, she held, relying on *R.* v. *City of Sault Ste.* Marie, [1978] 2 S.C.R. 1299, that one cannot be said to permit that which one has no legal capacity or authority to prevent. To be guilty one must be, in her words, "in a position to exercise control over the activity and prevent the pollution from occurring, but fail to do so".

[para29] Huddart J. said this:

> If the element of control i[s] essential, as I believe Sault Ste. Marie says that it is, then the Crown argues that there was evidence before the trial judge from which she could conclude that Rivtow did have that authority or control. In his written argument counsel for the

> Crown says that "...Rivtow failed to prevent a pollution occurrence which it ought to have foreseen. It is clear that Rivtow could and should have controlled the deposit of oil from B.A.'s asphalt plant and/or the deposit of oil from the main collecting pond ('C'). Rivtow was responsible."
>
> This argument fails because the trial judge did not find that Rivtow "could" have controlled the deposit of oil into the drainage system by B.A. and she acquitted Rivtow of the charge of having deposited oil into fishing waters. What she found is that Rivtow did nothing about B A.'s polluting activities and thereby provided the opportunity for them to continue. The fact that Rivtow could have controlled the deposit from the last collecting Pond is rendered irrelevant by this acquittal.
>
> I cannot find in the trial judge's findings of fact as to the nature of Rivtow's operations support for an inference that it has any authority or control over B.A. The evidence at trial suggested at most the degree of influence one might expect between neighbours sharing a drainage system. Put simply, providing the opportunity for pollution to continue by not doing anything about a neighbour's activities, is not enough to constitute the actus reus of section 36(3) in view of the principles set down by the Supreme Court of Canada in Sault Ste. Marie.
>
> An example by way of analogy might assist. Consider two neighbours who share a common ditch. One of them, while changing the oil in her car, causes some oil to flow down her driveway into the ditch. The water and the oil then flow across the innocent neighbour's property through the common ditch into water frequented by fish. To allow a conviction in such circumstances would be to find the accused guilty of the acts of another and to use the language of Devlin J. (supra at p. 8), it would be "pouncing on the most convenient victim". If the legislature wishes to place a positive duty on a neighbour in such circumstances it can do so in clear language.
>
> I do not think the fact that the innocent neighbour is the landlord of the polluter is relevant unless the terms of the agreement between the neighbours gives the first some authority. In the case at bar there was no evidence about any agreement between Rivtow and B.A. The trial judge must have inferred a tenancy arrangement from the evidence of any employee of Rivtow. Indeed, there was no evidence that Rivtow had the ability to control the conduct of B.A., nor was there evidence to support such a finding. B.A. was not carrying on business for the benefit of Rivtow nor was it undertaking work on behalf of Rivtow such that control, power, or even influence could be inferred.
>
> In conclusion, the decision by the trial judge is inconsistent with the principles set down by the Supreme Court of Canada in Sault Ste. Marie. [Emphasis mine.]

[para30] I confess I do not understand the second emphasized passage.

[para31] As I have noted earlier, the main collecting pond "C" was on Rivtow's portion of the parcel.

[para32] The grounds of appeal to this Court are these:

1. THAT the learned appeal Judge erred in law by misapplying the principles set down by the Supreme Court of Canada in *Regina* v. *City of Sault Ste. Marie* as it related to its consideration of the "element of control" in strict liability offences.

2. THAT the learned appeal Judge erred in law by misapplying the principles set down by the Supreme Court of Canada in *Regina* v. *City of Sault Ste. Marie* as it related to its consideration of the word "permit".

3. THAT the learned appeal Judge erred in failing to uphold the learned trial Judge's finding that the Respondent did permit the deposit of a deleterious substance in water frequented by fish.

4 AND UPON such other grounds as Counsel may advise.

[para33] First, I would not have thought it necessary to rely on *R.* v. *Sault Ste. Marie*, supra, on the issues arising in this case. *R.* v. *Sault Ste. Marie* is about the necessary state of mind in so-called strict liability offences. It is not directed to the proper interpretation of the sections of the *Fisheries Act* in issue. I do accept, however, that one cannot be said in ordinary speech to permit that which one cannot prevent. But *R.* v. *Sault Ste. Marie* does not stand for the proposition that Parliament cannot require one to clean up that which one could not have prevented.

[para34] As I understood counsel for the respondent in this Court, he told us that the issue on the second count before the learned trial judge and before Huddart J. was the respondent's liability for a failure on its part to Prevent B.A. from depositing oil in that portion of the drainage system on the land occupied by B.A.

[para35] In my opinion, if counsel was of that opinion at the trial, he did not understand the thrust of the Crown's case.

[para36] In its evidence, the Crown first sought to prove, and as Giroday P.C.J. points out, failed to prove, that Rivtow had deposited oil in the system in those parts of it above the asphalt plant and, secondly, sought to prove by the extensive evidence concerning collecting pond "C", much of which I have quoted, that Rivtow permitted the deposit from that point to the creek. If that was not the Crown's case on count 2, the evidence of the management and control of pond "C" to which I have adverted was irrelevant. But if that evidence was irrelevant, why was it not objected to?

[para37] The Crown's case before the learned trial judge on the second count was not limited to whether the appellant permitted B.A. to put oil into B.A.'s part of the system. Quite obviously, the learned trial judge did not think so as is shown by subparagraph (h) of her reasons.

[para38] As I understand Mr. Kaardal, he now founds his submission as to what the Crown's case was at trial on the wording of count 2. He says that by saying "to wit: oil" the Crown was invoking s. 34(1)(a) and that its argument now, founded upon the presence of oil in pond "C", is, in fact,

invoking s. 34(1)(b). I take it he means that the second count ought to have read "a deleterious substance, to wit: water containing oil".

[para39] He says further that only in the dying moments of argument before Giroday P.C.J. did the Crown raise the case as it has now been argued.

[para40] With all respect, the learned trial judge found as a fact that "oil" was found in Shannon Creek on the 21st November, 1989. That finding of fact cannot be attacked in this Court, founded as it was on the evidence. The expert says he found "oil" in the samples and Mr. Tancock said that "oil was so thick" in pond "C" that he could not see a fish which "scooted off in underneath the sheet of the oil".

[para41] In my opinion, this argument, founded on the wording of the count, is a quiddity. I am sure that had it been put to the learned trial judge, she would have had no hesitation in amending the count to conform to the evidence.

[para42] Mr. Kaardal also argues, as I understand him, that the very wording of the second count militates against any liability on the part of Rivtow for permitting the oil to go from pond "C" to the creek. Relying upon certain American authorities, he says that "deposit" cannot encompass, although these were not his exact words, failing to clean up someone else's deposit of a deleterious substance onto one's land which then went into waters frequented by fish.

[para43] As to this point, I do not find it necessary to address those authorities because the *Fisheries Act* contains its own definition of the word "deposit". Suppose, instead of what happened here, B.A. had put, without permission, on to the respondent's land, a number of leaking drums filled with oil and, knowing of the presence of those drums, the respondent had done nothing. In my opinion, upon the plain words of the definition of "deposit", the respondent would be liable for such inaction. Both "leaking" and "seeping" can occur by inaction.

[para44] Here, the oil, albeit floating on the water, was discharged from the collecting pond into the system and thence into the creek. The respondent permitted that discharge.

[para45] In cases in which the accused is alleged to have permitted a deposit and the evidence discloses inaction, the real issue is whether the accused had exercised due diligence.

[para46] I return to the grounds of appeal.

[para47] As to the first and second grounds, I need only say that, in my opinion, far more was made of *R.* v. *Sault Ste. Marie*, supra, than was warranted on the findings of fact of the learned trial judge. There was no question, and it was not disputed in this Court, that the respondent knew of the presence of oil in pond "C" and knew that the contents of pond "C" made their way to the creek. It had no defence of due diligence.

[para48] As the learned appeal court judge considered the failure to control the contents of pond "C" was "irrelevant", it is the third ground which must be considered.

[para49] Although that ground does not contain the words "in law", nonetheless, in my opinion, it does raise a question of law upon which the learned judge erred. That question, quite simply, was whether the learned trial judge's findings of fact in law supported the conviction on count 2. They did.

[para50] I would, therefore, give leave to appeal, allow the appeal and restore the conviction.

SOUTHIN J.A.

[para51] PROWSE J.A.:-- I have had the privilege of reading, in draft, the reasons for judgment of Madam Justice Southin. With respect, I conclude that an argument raised by the respondent which deals with the wording of Count 2 of the Information is determinative of the appeal in favour of the respondent. While the point is narrow, I am persuaded that it is meritorious.

[para52] Counsel for the respondent submits that Count 2 of the Information is particularized in such a way that it is clear it is based on the definition of "deleterious substance" found in s. 34(1)(a) of the *Fisheries Act*, R.S.C. 1985, c. F-14 (the "*Act*"). He submits that, having particularized the Information by utilizing the definition of deleterious substance in s. 34(1)(a), the Crown is bound to prove the Count as particularized in order to obtain or sustain a conviction under Count 2. [See *R*.v. *Johnson* (1977), 35 C.C.C. (2d) 439 (B.C.C.A.)] Counsel submits that this is particularly so since the trial proceeded on the basis that s. 34(1)(a) was applicable and the arguments of counsel were framed accordingly.

[para53] The relevant provisions of the *Act* are as follows:

> 34. (1) For the purposes of ss. 35 to 43, "deleterious substance" means
>
> > (a) any substance that, if added to any water, would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water, or
> >
> > (b) any water that contains a substance in such quantity or concentration, or that has been so treated, processed or changed, by heat or other means, from a natural state that it would, if added to any other water, degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water,
>
> 34. (1) "deposit" means any discharging, spraying, releasing, spilling, leaking, seeping, pouring, emitting, emptying, throwing, dumping or placing;
>
> 36. (3) Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any such water.

[para54] Count 2 of the Information states that the respondent:

> Count 2: Did permit the deposit of a deleterious substance to wit: oil in a place under conditions where the deleterious substance to wit: oil may enter water frequented by fish, to wit: Shannon Creek,
>
> Contrary to Section 36(3) of the *Fisheries Act* [Emphasis added]

[para55] I agree with counsel for the respondent that Count 2 of the Information particularizes the deleterious substance in accordance with s. 34(1)(a) of the *Act*. Although the place where the deleterious substance is deposited is not particularised in Count 2, the wording of that Count makes it clear that the place is somewhere other than in Shannon Creek.

[para56] The learned trial judge was not able to determine whether the oil found in Shannon Creek came from Rivtow's activities or from the activities of B.A. Blacktop Ltd. ("B.A."). She assumed, therefore, in favour of Rivtow, that B.A. oil was the pollutant. If B.A. oil was the pollutant, it follows that the deposit of oil by B.A. was on B.A. occupied property. That is the place referred to in Count 2. There is no dispute that Rivtow did not have the authority either to permit or prohibit the deposit of oil on B.A. occupied property. In the absence of a finding that Rivtow had any control over the deposit of oil by B.A. on B.A. occupied property, I conclude that Rivtow should not have been convicted of the offence charged in Count 2 of the Indictment.

[para57] In the result, I would dismiss the Crown's appeal.

PROWSE J.A.

HUTCHEON J.A.:-- I agree.

ALBERTA COURT OF QUEEN'S BENCH

[Indexed as: *R.* v. *Bremner*]

Between: Her Majesty The Queen, Respondent, and Richard L. Bremner and Bremner Engineering and Construction Ltd., Applicants

O'Leary J.

Calgary, December 14, 1993

***Fisheries Act*, R.S.C. 1985, c. F-14, s. 36(3) – individual and corporate accused charged under s. 36(3) – upgrading sewer system in Canmore – unexpected volume of water accumulated and was discharged into Spring Creek – water contained high degree of silt – both accused convicted in 1990 – application to extend appeal period denied**

Criminal procedure – application to extend appeal period – power is discretionary – court can take into account 4 factors – applicant's bona fide intention to appeal during appeal period – whether the applicant had a reasonable excuse – whether it is arguable that the judgement of the trial judge was wrong – discretion should be exercised in favour of applicant where failure to do so would result in a miscarriage of justice

Summary: The Applicants were charged with violating s. 36(3) of the *Fisheries Act*. Both the individual and corporate accused were convicted; reasons were issued on June 27, 1990 and sentence was imposed on September 27, 1990. There were no steps taken to appeal until August 27, 1993. In the interim, the Association of Professional Engineers, Geologists and Geophysicists of Alberta (APEGGA) held disciplinary hearings and suspended the rights of the individual Applicant to practice his profession for one year, based largely on the fact of the conviction. This is an application to extend the period for appealing conviction and sentence beyond the 30 day period established in the *Criminal Code* and the *Alberta Rules of Court*.

The power to extend the appeal period is discretionary. However, the court considered factors identified in previous cases for determining whether or not to exercise that discretion in favour of the Applicants. (1) The court determined that the Applicants had no *bona fide* intention to appeal during the appeal period. (2) The Applicants' explanation for the delay was that the disciplinary hearing produced expert opinions that might have resulted in acquittal had they been before the trial judge. The learned justice found the explanation not to be reasonable as the information and expertise was available at trial. (3) The court found that the Applicants did not have a reasonable prospect of success on appeal. The learned justice reviewed the Reasons for Judgement and found that there was evidence before the trial judge of sufficient weight of the presence of fish and fish habitat in Spring Creek and that the trial judge's conclusion that silt was a deleterious substance was not unreasonable. (4) The court found that its failure to extend the time for appeal would not result in a miscarriage of justice, as there was no question of an error of law at trial.

REASONS/MOTIF:

R.W. Eden, Q.C. and G.E. Peterson, Counsel for the Applicants
A.H. Channer, Counsel for the Respondents

[para1] O'LEARY J.:-- The Applicants seek to extend the time within which to appeal their conviction and sentence on a charge of violating Section 36(3) of the *Fisheries Act*, R.S.C. 1985, c. F-14 ("the Act").

[para2] The individual Applicant is a professional Engineer who wholly owns and controls the corporate Applicant. They were jointly charged that they:

> "Between the 1st day of October, A.D. 1989 and the 30th day of November, A.D. 1989, at or near Canmore, in the Province of Alberta did unlawfully deposit or permit the deposit of a deleterious substance in any type of water frequented by fish ...."

[para3] The relevant part of Section 36(3) is as follows:

> "(3) ... no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish ...."

The term "deleterious substance" is defined in Section 34(1) as meaning:

> "any substance that, if added to any water, would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man or fish that frequent that water."

The same Section defines "fish habitat" as:

> "Spawning grounds and nursery, rearing, food supply and migration areas on which fish depend directly or indirectly in order to carry out their life process."

[para4] The trial occupied six days. The trial judge reserved judgment and on June 27, 1990 issued written reasons in which he convicted both Defendants: (1991), 119 A.R. 81. Sentence was imposed on September 27, 1990.

[para5] The Applicants took no steps to appeal until August 27, 1993. In the interim, a discipline committee of the Association of Professional Engineers, Geologists & Geophysicists of Alberta ("APEGGA") investigated the circumstances and, based largely on the fact of the conviction, suspended the right of the individual Applicant to practice his profession for a period of one year. He has appealed that decision and the appeal has been stayed pending the outcome of this application.

[para6] During the course of preparing for the appeal the Applicants concluded that they may have had a good defence to the charge and they then initiated this application.

[para7] In 1989 the corporate Applicant was awarded a contract to upgrade the sewer system in the Town of Canmore. During the course of the work an unexpected volume of water accumulated in excavations and was discharged into Spring Creek. The water contained a high degree of silt, the "deleterious substance" alleged by the Crown. The charge was not laid until August, 1990 despite the fact that Federal and Provincial environmental officials were aware of the discharge when it occurred.

[para8] Notice of Appeal from conviction of a Summary Conviction offence must be filed within 30 days after the conviction was made or sentence was imposed, whichever is later (Section 815(1) of the *Criminal Code* and Rule 850.3(1) of the *Alberta Rules of Court*). Section 815(2) of the *Code* authorizes this Court to extend the time within which a Notice of Appeal may be filed.
[para9] The power to extend the time for appeal is discretionary. There are no fixed criteria and each case must be decided on its own merits. A number of factors have, however, been identified as requiring examination when considering whether or not to exercise the discretion. In *R.* v *Cole* (1977), 33 C.C.C. (2nd) 242, the Court, after reviewing the authorities, held that consideration must be given to three factors:

1. Whether the Applicant has shown a bona fide intention to appeal while the right to appeal existed;

2. Whether it is at least arguable that the judgment of the trial Court was wrong; and

3. Whether the Applicant acted with reasonable diligence or has a reasonable excuse for the delay.

[para10] The Court added a fourth element to those recognized to that point: the discretion should be exercised in favour of an applicant where refusal to do so would result in a miscarriage of justice.

[para11] Although the Court must consider each of the above matters, the relevance and relative importance of each are issues for the Court's determination in the circumstances of the particular case. Twaddle, J.A. said in *R.* v. *Mohammed* (1989), 52 C.C.C. 470, at p. 476:

> "For the purpose of doing justice, a judge hearing an application for a time extension will consider, so far as each is relevant to the case before him, each of the matters which ... it is incumbent on the applicant to show. But the relevance and the relative importance of each are issues for the judge's determination on the facts properly before him ...."

BONA FIDE INTENTION TO APPEAL

[para12] The Applicants had no intention to appeal while the right to appeal existed. Almost three years elapsed between the date the right to appeal expired, October 27, 1990, and the initiation of this application on August 27, 1993. The intention to appeal arose only when a possible defence or defences came to light in the course of preparing an appeal from the APEGGA disciplinary proceedings.

EXPLANATION FOR DELAY

[para13] I have referred above to the Applicants' explanation for the delay in bringing this application. The disciplinary suspension was imposed by APEGGA in May, 1993. This application was filed August 27, 1993. The Applicants have moved promptly since receiving advice from their solicitors that they may have had other defences to the charge.

[para14] The decision to appeal was not made as a result of the penalty imposed in the disciplinary proceedings but was, rather, triggered by the receipt of expert opinions which, had they been before the trial judge, may have resulted in an acquittal.

[para15] The explanation for the delay is not reasonable. The new evidence is based on information and expertise which was available at the time of trial.

ARGUABLE THAT TRIAL VERDICT WRONG?

[para16] Another way of expressing this factor is to ask whether the Applicants have a reasonable prospect of success on appeal.

[para17] Section 686 (1) (a) of the *Code* sets out the grounds upon which an appeal Court may allow an appeal from conviction:

(a) The appeal may be allowed if:

(i) the verdict is unreasonable or cannot be supported by the evidence,

(ii) there is a wrong decision on a question of law,

(iii) on any ground there was a miscarriage of justice.

[para18] The Applicants submit that there was no evidence or insufficient evidence that, at the relevant time, there were fish in Spring Creek or that it was a fish habitat. Therefore the trial judge's conclusion that the discharge was a "deleterious substance" is not supported by the evidence and is unreasonable.

[para19] In his Reasons for Judgment the trial judge said at page 109 (para. 120):

> "Spring Creek is much frequented by fish. Indeed it is an important spawning area for brook trout. It is designated Class 2 for fish habitat meaning it is good fish habitat. Siltation (the collection of silt on the creek bed): (1) reduces the areas available for fish to spawn, (2) potentially it reduces the survival rate of the eggs that are deposited, (3) reduces the interstitial habitat between the rocks and stones that would be utilized by the juvenile fish (which results in a reduction in the value of the area for raising fish), and (4) negatively impacts on some of the Benthonic Macro Invertebrates which are of importance to the trout. It adversely impacts on both the fish and their habitat."

He continued on the same page at para. 122:

> "It is clear to me that the water placed into Spring creek by the accused contained within it a deleterious substance (silt). It was deleterious to the Creek as a fish habitat and to the fish which frequented the Creek."

[para20] The Crown did not have to establish that the silt deposited into Spring Creeks in fact degraded or altered the quality of the water. It merely had to prove the deposit and that the silt deposited was a "deleterious substance", that is, that it was potentially harmful to fish or fish habitat, one or both of which were present in Spring Creek at the critical time. The magnitude of the harm or potential harm is immaterial. In *R.* v. *MacMillan Bloedel (Alberni) Limited* (1979), 47 C.C.C. (2d) 118, the British Columbia Court of Appeal said at p. 121:

> "Section 33(2) [now Section 36(3)] prohibits the deposit of a deleterious substance, not the deposit of a substance that caused the water to become deleterious."

[para21] The deposit of silt is not the deposit of a deleterious substance merely because it could harm fish or fish habitat. To be deleterious, the deposit must have the potential to actually harm fish or fish habitat. That means that one or both of fish or fish habitat must be exposed to a risk of harm as a result of the deposit. The Crown concedes that in order to prove that the silt deposited was a deleterious substance it must show that the deposit could have harmed fish or fish habitat, and to do so must show that there were fish or fish habitat in Spring Creek which were exposed to harm as a result of the Applicants' discharge into it of silt-laden water.

[para22] It is conceded that the water discharged contained a percentage of silt which would render it harmful to fish or fish habitat had either or both been present in Spring Creek between October 1 and November 30, 1989.

[para23] The question is whether there was sufficient evidence before the trial judge of the presence at the relevant time of fish and/or fish habitat in Spring Creek which could have been harmed by the deposit. If there was some evidence upon which the trial judge could reasonably have concluded that fish or fish habitat, or both, were present, the Applicants would have no reasonable prospect of success on an appeal. On the other hand, if there was no evidence or insufficient evidence on this vital point, the Applicants would have a reasonable chance of succeeding on an appeal. In the latter case the Crown would have failed to prove an essential element of the offence, namely that the silt deposited was a deleterious substance. The verdict would be unreasonable and not supported by the evidence.

[para24] I have carefully reviewed the Reasons for Judgment of the trial judge and those portions of the evidence to which I have been referred by counsel. I am of the view that there was evidence before the trial judge of the presence of fish and fish habitat in Spring Creek of sufficient weight and credibility to support the verdict. The trial judge's conclusion that the silt was, in the circumstances, a deleterious substance was not unreasonable. In my opinion the Applicants would not have a reasonable prospect of success on appeal.

[para25] It is not suggested that the trial judge erred in respect of a question of law. In my view the refusal to exercise my discretion in favour of extending time will not result in a miscarriage of justice.

[para26] The application is dismissed.

BRITISH COLUMBIA SUPREME COURT

[Indexed as: R. v. Fletcher Challenge Canada Ltd.]

Between Regina, Respondent, and Fletcher Challenge Canada Limited, Appellant

Errico J.

Prince Rupert, January 24, 1994

***Fisheries Act*, R.S.A. 1985, c. F-14, s. 35(1) – whether trial judge correctly discounted credibility of defence witnesses thereby leaving no basis for due diligence defence – was sufficient evidence to support trial judge's findings**

Criminal procedure – credibility – test for appeal court – proper test is could a jury or judge properly instructed and acting reasonably have convicted – appeal court should show great deference to trial findings of credibility

Summary: The appellant was charged under s. 35(1) of the *Fisheries Act* with carrying on a work or undertaking resulting in harmful alteration, disruption or destruction of fish habitat. The appellant was convicted at trial and appealed on the basis that findings of credibility by the learned trial judge, which left no basis for the defence of due diligence, were unsupported by the evidence or were unreasonable.

The charge arose from the appellant's logging activities near a tributary to Indian Cabin Creek, B.C., which is classified as a class I salmonoid creek. A contractor for the appellant felled unmerchantable timber in a leave strip across, along and into the creek. In support of a claim of due diligence, the appellant argued that there had been extreme blow-down in the stretch of the tributary in question and that felling the leave strip was essential to clean up the creek. The appellant also argued that Fisheries did not require a leave strip and that ultimately, the edge of the stream was to be fully logged. A Fisheries Officer had inspected the tributary just prior to the appellant's actions and did not observe extreme blow-down in that part of the creek.

The learned trial judge rejected the appellant's submissions regarding whether a leave strip was required and whether there was extensive blow-down in the area. On appeal, the appellant challenged the latter finding. The court reviewed the relevant evidence before the learned trial judge and applied the test of whether a jury or judge properly instructed and acting reasonably could have convicted. While showing great deference to findings of credibility at trial, the court found that there was evidence upon which the trial judged could make the findings he did and there was no material misapprehension of the evidence.

Held: Appeal dismissed.

REASONS/MOTIF:

C.H. Harvey, Q.C., Counsel for the Appellant

M.J. Shaw, Counsel for the Respondent

[para1] ERRICO J.:-- The appellant, Fletcher Challenge Canada Limited ("Fletcher Challenge"), appeals its conviction under section 35(1) of the *Fisheries Act* of Canada, R.S.C. 1970, c. F-14 which provides:

> "s.35(1) no person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat."

[para2] This appeal deals with the trial Judge's adverse findings as to the credibility of the witnesses who testified for Fletcher Challenge. These adverse findings left no basis for a consideration of the defence of due diligence that was raised. The position of Fletcher Challenge on this appeal is that those findings of credibility were unsupported by the evidence or were unreasonable.

[para3] The trial Judge in his written reasons gives the following overview of the surrounding circumstances:

> "Indian Cabin Creek flows into Long Inlet which is located approximately 45 minutes travel by boat in Skidegate Inlet West of Queen Charlotte City. It is a class I salmonoid creek ranked the 4th highest producer of salmonoid out of the 39 salmonoid creeks feeding into Skidegate Inlet. The tributary, the subject creek in this case, is also classified class I.
>
> The tributary has three sections. The first section is a small lake in the upper levels contained by a beaver dam. The second section, the subject of this case, is a 275 meter stretch of creek from the beaver dam to a bridge built by Fletcher. The third lower section is the creek from the bridge to where it feeds into Indian Cabin Creek.
>
> Cut block L-30 was awarded to Fletcher to log, amongst other areas, the area around the lake and down to Indian Cabin Creek. Logging commenced in the upper and middle sections with a leave strip remaining either side of the creek in the middle section.
>
> On or about October 6, 1990, an employee, Armand Boutin, of Copper Bay, on instructions from Morris Campbell, President of Copper Bay [Copper Bay Contracting Ltd. was a contractor for Fletcher Challenge and a co-accused], felled unmerchantable trees, hemlock and spruce timber, snags, leaners, in the middle section leave strip, across, along, and into the creek. Both accused argue that cutblock L-30 and particularly the middle and lower sections, above and below the bridge, experienced an extreme blow-down of trees in the leave strip into the tributary in September and October 1990, and therefore, felling the leave strip, including bucking wind throw and snags, was necessary to clean up the creek. It is a hard fact that the wind-throws, an act of God, were not reported by Fletcher to Forestry or Fisheries personnel as is required in the British Columbia Coastal Fisheries Forestry Guidelines Manual, Second Edition, 1988. By chance, on October 9th, 1990, Fisheries Officer Deborah Hughes in the presence of Fisheries Officer Robert Pettigrew inspected the tributary for the specific purpose of checking blow-down in the lower section of the creek that Fisheries Officer Pettigrew had observed on October 3, 1990. Fisheries Officer Hughes

> notified Fisheries and Forestry causing everything to come to a head while plans were made for the clearing out of fallen timber and debris and cleaning of the creek. The faller, Armand Boutin, did not testify in court for it was reported that he cannot be found. Both Crown and the accused have been unable to locate him or knowledge of his whereabouts."

[para4] The evidence disclosed that a "leave strip" is an area next to a stream in which timber which can be felled and yarded away from the stream leaving standing merchantable timber and timber that cannot be felled except over or into the stream and other forest growth and snags.

[para5] The position taken by Fletcher Challenge at trial, through the evidence of its employees, was that there was no leave strip required by the Department of Fisheries for this portion of the stream and that while a leave strip had, in fact, been left during the initial felling of trees in this area it was done so with the intention that the merchantable timber would be removed at a later date when it could be yarded with minimal damage to the stream immediately upon being felled.

[para6] It was the position of Fletcher Challenge that some time prior to October 1st, 1990 winds had blown down the majority of the remaining timber and that a decision was made on October 1st, 1990 to fell the remaining timber before it also was wind thrown, to remove all of the merchantable timber and to clean up the stream. This would, in effect, advance the original logging plans because of the wind thrown trees. This was the basis for the defence of due diligence.

[para7] The principles to be applied by an appellant Court in dealing with the findings of the trial Court as regards credibility may be summarized in the following passages from authorities cited to me by counsel for the appellant.

[para8] In *Yebes* v. *The Queen*, (1987), 36 C.C.C. (3d) 417 (S.C.C.), McIntyre J., for the Court, summarized the function of an appellant Court in the following passage at page 430.

> "In my view, the majority of the Court of Appeal did not fail to apply the correct principles relating to the treatment of circumstantial evidence. The function of the Court of Appeal, under s. 613(1)(a)(i) of the Criminal Code, goes beyond merely finding that there is evidence to support a conviction. The court must determine on the whole of the evidence whether the verdict is one that a property instructed jury, acting judicially, could reasonable have rendered. While the Court of Appeal must not merely substitute its view for that of the jury, in order to apply the test the court must re-examine and to some extent reweigh and consider the effect of the evidence. This process will be the same whether the case is based on circumstantial or direct evidence."

[para9] In *Regina* v. *R.W.* (1992), 74 C.C.C. (3d) 134 the Supreme Court of Canada considered the application of these principles to a finding of credibility. McLachlin J., for the Court at page 141 said:

> "It is thus clear that a court of appeal, in determining whether the trier of fact could reasonably have reached the conclusion that the accused is guilty beyond a reasonable doubt, must re-examine, and to some extent at least, reweigh and consider the effect of the evidence. The only question remaining is whether this rule applies to verdicts based on

> findings of credibility. In my opinion, it does. The test remains the same; could a jury or judge properly instructed and acting reasonably have convicted? That said, in applying the test the Court of Appeal should show great deference to findings of credibility made at trial. This court has repeatedly affirmed the importance of taking into account the special position of the trier of fact on matters of credibility: *White* v. *The King* (1947), 89 C.C.C. 148 at p. 151, [1947] S.C.R. 268, 3 C.R. 232; R. v. M.(S.H.) (1989), 50 C.C.C. (3d) 503 at pp. 548-9, [1989] 2 S.C.R. 446, 71 C.R. (3d) 257. The trial judge has the advantage, denied to the appellate court, of seeing and hearing the evidence of witnesses. However, as a matter of law it remains open to an appellate court to overturn a verdict based on findings of credibility where, after considering all the evidence and having due regard to the advantages afforded to the trial judge, it concludes that the verdict is unreasonable."

[para10] In *Whitehouse* v. *Reimer et al.*, [1980] 116 D.L.R. (3d) 594 (Alta. C.A.), at p. 595 Laycroft J.A., for the court, in considering an appeal based on a finding of credibility said:

> "Where a principal issue on a trial is credibility of witnesses to the extent that the evidence of one party is accepted to the virtual exclusion of the evidence of the other, it is essential that the findings be based on a correct version of the actual evidence. "

[para11] Defence witnesses testified that no leave strip was required by Fisheries to be left and that ultimately the edge of the stream was to be fully logged. This evidence was rejected by the trial judge. Those witnesses were, in part, the witnesses upon which Fletcher Challenge relied to establish the factual background for the defence of due diligence. The basis of the rejection was the acceptance of the evidence of a senior fisheries officer which was consistent with the *Coastal Fisheries Regulations* which dictated a leave strip on Class I streams, unless there was a written exemption in the cutting permit. The cutting permits which were filed in evidence did not contain such exemptions.

[para12] Fletcher Challenge does not challenge this adverse finding in this appeal but rather the trial judge's finding that the evidence of the appellant's witnesses that there had been an extensive blow-down of timber in the relevant area was a fabrication. The trial judge was assessing credibility on this latter point in the context of his other findings of credibility. In assessing the evidence of the principal witness for Fletcher Challenge on this point, the trial judge found it difficult to believe his evidence over that of the witness who had inspected the creek at about that time for the Fisheries Department. Referring to the Fletcher Challenge employee, the trial judge referred to his 25 years in the logging industry and said that he:

> "... clearly understands the importance of Class I streams, the spawning times of salmon, the 'operating window' of June 1 to August 15 in the Queen Charlotte Islands and the need to be in constant contact with Fisheries and Forests, yet he goes ahead with a plan to 'fall and yard' in conflict with all his knowledge and Coastal Fisheries Forestry Guidelines. It isn't reasonable or credible. I find that his explanation that 60% of the leave strip was wind-thrown is a complete fabrication to justify the falling on October 6, 1990. Mr. Pettigrew's evidence on his observations of wind-throw on October 3, 1990, is accepted by the court."

[para13] It is clear from that passage that the trial judge is not simply rejecting the evidence of the Fletcher Challenge witness by accepting the evidence of the Crown witness.

[para14] With regards to the more narrow issue of whether or not the trial judge was in error in what the evidence of Mr. Pettigrew actually was, counsel for Fletcher Challenge refers to the following passage as the trial judge's finding:

> "On October 3 (Pettigrew) had 'no concern about blow-down above the bridge' ... windthrow in the middle section ... as Mr. Pettigrew said, ...did not exist."

[para15] The Trial judge's findings in full on this subject are as follows:

> "The statement is totally in conflict with the testimony of Robert Charles Pettigrew, a charter boat operator, who, as a part time fisheries officer, had documented his inspections of Indian Cabin Creek and the tributary on September 8, 16, 23, 30, October 3, 9, 15, 19, 24, 31. For the past eleven years, Mr. Pettigrew has been looking after Indian Cabin Creek. He testified that up to 1990 there were no references to blow-downs in the Indian Cabin Creek. The forest was old growth - a mix of spruce and hemlock - which provided a stable cover for the creek. On September 8, 1990 he walked through the leave strip from the bridge to the lake. The leave strip was approximately 10 meters on both sides of the creek. Logging had taken place above the bridge and about 100 meters down below the bridge. On September 8th he did not see blow-down. On October 3rd he observed that 'there was more blow-down below the bridge which was a major problem for the large number of fish in the lower part of the creek.' On October 3 he had 'no concern about blow-down above the bridge.'"

[para16] Counsel for the appellant then refers to the evidence of Mr. Pettigrew found in his examination in chief as follows:

> "Q. And October 3rd, What can you say about blow-down above the bridge?
>
> A. Similar. I have no -- no recollection of any major blow-down up there. I do not believe I inspected that section of the stream above that bridge and the reason that I would not inspect that stream -- I did not inspect that portion of that stream all of the time because by then you're through -- I would be through the most productive area of the stream ..."

[para17] This passage does not cover all of Mr. Pettigrew's testimony with regard to his inspection on October 3rd. Immediately prior to the above passage the following passage appears in the transcript:

> "Q. Now, during September 1990 and in regards to this leave strip between the lake and the bridge; we've heard testimony that sixty percent of that leave strip was blown down by wind. Can you comment on that?
>
> A. I'm just thinking back to my September 30th walk and at that time I believe that I walked to the bridge, not above and I believe that I observed a blow down -- a few blow-

> down (sic) below the bridge but did not inspect that area above the bridge. When I looked upstream I did not, in my memory, observe any massive blow-down, either on September 30th or October 3rd. October 3rd there was more blow- down noted approximately a hundred metres below the bridge and that was of a major concern to me because it was lying in the creek. There were a lot of fish in the creek at that point, struggling past this blow-down that was in the creek and at that time I believe that I asked Debra Hughes to accompany me on the next walk to inspect that particular blow-down. This is relating to the area below the stream.
>
> Q. Below the bridge?
>
> A. Sorry, below the -- below the bridge and my memory -- I just do not have any recollection of any major blow-down at that time, up until October 3rd, in the upper portion above the bridge."

[para18] While the portion of the trial judge's findings quoted above makes reference to "no concern about blow-down above the bridge" and that exact passage does not appear in the testimony of Mr. Pettigrew, a reading of the trial judge's reasons in full, I think, makes it clear that what he accepts is that there was no severe or major blow-down above the bridge, the area in question, about which Mr. Pettigrew had any concern. As I read the trial judge's reasons in full they are that he rejects the defence evidence that there was a major blow-down above the bridge by October 1st, 1990, the time when the defence evidence was that there was a discussion and decision to fell the remaining trees to prevent further blow-down and further damage.

[para19] Accordingly, I am of the view that the trial judge's findings, accepting the observations of Mr. Pettigrew over those of the woods foreman of Fletcher Challenge are not unreasonable or not supported by the evidence. I think that a reading of his entire reasons does not suggest that this finding of credibility was based on certain isolated portions of the evidence, but rather on all of the evidence of the defence witness as against all of the Crown evidence.

[para20] The defence witnesses testified that they held a meeting on October 1st, 1990 in which they discussed logging this leave strip and they then decided, because of the major wind throw that had already occurred, to complete the logging of this strip. The trial judge found in his reasons as follows:

> "...He may have discussed logging the leave strip in the middle section but he did not at that time formulate a plan with Mr. Kay to clean up wind throw in the middle section, because as Mr. Pettigrew said, it did not exist."

[para21] Counsel for Fletcher Challenge submits that there was no cross-examination of that defence witness on that point, nor was there any evidence led to suggest that the meeting did not occur. I do not think that the trial judge suggested that the meeting did not occur. He made his finding that there could have been no discussion about cleaning up the existing wind throw or that the existing wind throw was the reason to log the area because of his finding that the severe wind throw had not occurred.

[para22] In his reasons the trial judge did not discuss evidence which dealt with the issue of whether or not a wind thrown tree which had been subsequently bucked could be distinguished from a tree which had been intentionally fallen. There was evidence that a wind thrown tree could, in certain circumstances, be bucked causing the root-wad to fall back into place leaving a stump, but that a felled tree and wind thrown tree, in those circumstances, could be distinguished by the absence of an undercut in the wind thrown tree. This evidence was given in part for the defence by an engineer who prepared a detailed report and drawing from an inspection sometime after there had been a cleanup or partial cleanup of the area. In that testimony there was some evidence of the distinction between a bucked wind thrown tree as opposed to a felled tree. The evidence and report of this witness was rejected by the trial judge, but the trial judge did not, in rejecting his evidence, reject the concept of determining whether a tree had been intentionally felled or wind-thrown and bucked. All of the Crown witnesses who said trees had been felled were cross-examined on this point and they all had knowledge of the distinction between a felled tree and a wind thrown bucked tree. Counsel for Fletcher Challenge submits the trial judge, in failing to direct his attention to an assessment of how many trees had been felled and how many trees had been wind thrown as adduced by the evidence of this survey and mapping, failed to appreciate evidence that would have gone to the other issues of credibility. Although the trial judge did not go into a detailed analysis of the question, the Crown witnesses denied that a large number of the tress were wind thrown and bucked and I do not think that the trial judge failed to appreciate significant evidence in failing to make that determination. He had rejected the survey on a number of grounds including the witnesses acknowledgement that he did not know how many trees or logs had been removed at the time of his survey.

[para23] Finally while the trial judge did not make any adverse findings of demeanour or appearance with regards to the defence witnesses, he did make positive findings in that regard with respect to the Crown witnesses.

[para24] Accordingly, I am of the view that there was evidence before the trial judge upon which he could make the assessment of credibility that he did, and I am further of the view that he did not misapprehend the evidence by making wrong findings of what the evidence actually was in making his findings of credibility.

[para25] It is not for this court to reassess credibility on a consideration of the transcript of evidence, but rather to determine whether or not there was evidence upon which the trial judge could reasonably make the finding he did. I am of the view that there was such evidence that supported the trial judge's findings; that he did not misapprehend the evidence before him in any material aspect and accordingly the appeal must be dismissed.

BRITISH COLUMBIA COURT OF APPEAL

[Indexed as: *R.* v. *West Fraser Mills Ltd.* #2]

Lambert, Legg and Finch JJ.A.

Vancouver, February 11, 1994

***Fisheries Act*, 1985, c. F-14, ss 35(1), 78, 82(1), 82(2) – interpretation of limitation period in s. 82 – whether certificate of ministerial awareness under s. 82(2) triggers operation of 2 year limitation for summary offences – whether in absence of certificate, limitation for summary conviction offences is 6 months under the *Criminal Code* – limitation in s. 82 provides a complete code – the limitation under s. 82 for summary conviction offences is 2 years – any extension of that limitation period requires a certificate of ministerial awareness under s. 82(2)**

Summary: The appellant was charged under s. 35(1) of the *Fisheries Act*. The alleged offences occurred between January 1, 1991 and March 31, 1991. The information was sworn on November 19, 1991, which is more than 6 months after the latest date the offences allegedly occurred. The Crown proceeded summarily. The learned provincial court judge found that the proceedings had not commenced within the time for summary proceedings under s. 82(1) of the *Fisheries Act*, held the appellant's not guilty plea a nullity and called on the appellant to elect a mode of trial. The learned provincial court judge held a preliminary inquiry and committed the appellant for trial.

The appellant applied for certiorari on the basis that (1) there was no evidence as to who damaged the fish habitat, and (2) the offence was statute barred because the information was sworn more that 6 months after the alleged offence. The learned chambers judge dismissed the application on both grounds.

The appeal to this court raised several issues. However, the court focused on two issues. The first concerns the interpretation of s. 82(2) of the *Fisheries Act*. The appellant argued that the proof of the Ministerial awareness is a "triggering event" for the application of the section giving rise to a limitation period of 2 years from the ministerial awareness of the offence. If there was no proof of ministerial awareness, by reason of s. 34(2) of the *Interpretation Act*, s. 782(2) of the *Criminal Code* applies and the limitation period is 6 months for a summary conviction offence. This interpretation was accepted by both the learned provincial court judge and the learned chambers judge.

The court agreed with the respondent that s. 82(1) of the *Fisheries Act* establishes a 2 year limitation period for summary conviction offences which can be extended for up to 2 years after the minister became aware of the subject-matter of the proceedings. The court reviewed the history of the provision noting that amendments to the act in 1991, including amendments to s. 82, strengthened the Crown's enforcement powers. The court found that it was not logical that Parliament would revert back to a 6 month limitation period under the *Criminal Code* given the long history of a 2 year limitation period for *Fisheries Act* summary conviction prosecutions.

The second issue the court addressed was the appropriate order to issue in light of its finding on the first point. The Crown argued that the appropriate remedy was to refer the matter back to the provincial court for a summary conviction trial. The court found that on a plain reading of s. 485(1) of the *Criminal Code*, the provincial court is not functus, and that the court has the jurisdiction to make the order requested by the Crown. However, the court also found that it has the discretion to make such an order but declined to do so in this case. To order the appellant to submit to a trial would be unfair given the length of time since the alleged offence and the expense to which the appellant has been put in defending itself. The unfairness did not arise from anything the Crown did or did not do. The order of the chambers judge was set aside and a direction issued that all charges be stayed.

Held: The order of the chambers judge was set aside and the charges under the original Information stayed.

REASONS/MOTIF:

Alan P. Czepil, Counsel for the Respondent
Gary W. Hales and Elizabeth L. Bayliff, Counsel for the Appellant

FINCH J.A. (for the Court, allowing the appeal):--

I

[para1] The appellant appeals from the dismissal of its application for certiorari to quash its committal for trial following a preliminary hearing on a charge of logging contrary to the provisions of s-s.35(1) of the *Fisheries Act*, S.C., c.F-14, as amended.

[para2] Originally the Crown elected to proceed summarily.

The appellant entered a plea of not guilty. When the trial commenced before the learned Provincial Court Judge, he raised the issue of whether the proceedings had been commenced within the time limited for summary proceedings under s-s.82(1) of the *Fisheries Act*. He concluded that they had not. He held that the appellant's not guilty plea was a nullity, and should be set aside. He called upon the appellant to elect its mode of trial. The appellant elected to be tried by a judge sitting alone.

[para3] The learned Provincial Court Judge then commenced a preliminary inquiry into the charges on the bases that the Information was valid and that the appellant was charged with indictable offences. At the conclusion of the preliminary inquiry the Provincial Court Judge committed the appellant for trial.

[para4] That committal gave rise to the appellant's application for certiorari. The appellant advanced two grounds of error:

1. that there was no evidence as to who damaged the fish habitat; and

2. that the offence was statute-barred in that the information was sworn more than six months after the alleged offence.

[para5] The learned chambers judge, before whom the application for certiorari came, held that there was evidence that the appellant or its agents may have caused the damage alleged to the fishery. He said that the first ground failed.

[para6] The second ground raised the issue as to how s- s.82(1) of the *Fisheries Act*, which provides a time limit for proceedings by way of summary conviction, should be interpreted. Subsection 82(1) says:

> 82 (1) Proceedings by way of summary conviction in respect of an offence under this *Act* may be instituted at any time within but not later than two years after the time when the Minister became aware of the subject-matter of the proceedings.

II

[para7] In his ruling on the interpretation of s-s.82(1), the learned Provincial Court Judge said:

> [t]he information alleges that the offences occurred between the 1st day of January, 1991, and the 31st day of March, 1991. The information was sworn on November 19, 1991, more than six months after the latest date upon which the offences could have been committed in accordance with the information sworn.

[para8] Then the judge referred to s-s.34(2) of the *Interpretation Act*, R.S.C. 1985, c.I-21, as amended, which provides:

> 34 (2) All the provisions of the *Criminal Code* relating to indictable offences apply to indictable offences created by an enactment, and all the provisions of that *Code* relating to summary conviction offences apply to all other offences created by an enactment, except to the extent that the enactment otherwise provides.

[para9] The Provincial Court Judge continued:

> [t]he *Criminal Code* provides that all proceedings commenced in a summary matter must be commenced within six months of the date of the alleged offence. In other words, the information must be sworn within six months.
>
> So, on the face of it, there has been non- compliance with the provisions of the *Criminal Code*.

[para10] The judge quoted s-ss.82(1) and (2). Then he said:

> I asked counsel for the Crown whether she would be able to give me an undertaking that before the completion of the case for the Crown she would file a document pursuant to 82(2), and drew attention to the fact that such a document could, under the provisions of s.

> 24 of the *Interpretation Act*, be signed by the Deputy Minister. She advises me that she is unable to give me such an undertaking.
>
> In the circumstances, I suggested that the appropriate disposition for me to make, having regard to the fact that the offence with which the accused is charged, may be prosecuted either by indictment, or summarily, by virtue of the provisions of s. 78 of the *Fisheries Act*, would be for me to set aside the pleas of not guilty that have been entered in this matter, and to treat the information as being brought by indictment, and then to call upon the accused to elect their mode of trial.

[para11] Later on he said:

> .... [t]he information, not having been sworn within the six months limitation period, and there being no certificate from the Minister of Fisheries or his deputy, the effect in law is that the information which has been sworn, charges the accused with indictable offences, and their pleas of not guilty must be treated as nullities, and set aside.

[para12] The appellant applied in the Supreme Court for certiorari to quash its committal for trial. In his ruling on the application for certiorari the learned chambers judge said this:

> [t]he Crown submitted that the [Provincial Court] ruling was incorrect and that in effect Section 82 of the *Fisheries Act* was a code in itself. I am of the opinion that Section 34(2) of the *Interpretation Act* which reads in part: "... except to the extent that the enactment otherwise provides..." does incorporate the six months limitation period provided by the *Code*. Section 82 is an exception to the rule that there is a six month limitation period. The issue is, has the *Fisheries Act* otherwise provided.
>
> Section 82 governs circumstances in which the Minister becomes aware of the subject matter of the charge within a certain time. Such instances do not cover all circumstances, and in fact did not cover the issue here. This being so, the *Fisheries Act* does not constitute a complete code, and with deference to the learned Provincial Court Judge I conclude he was correct.

[para13] Accordingly he dismissed the application for certiorari.

III

[para14] On this appeal, the appellant raises the following issues:

1. The learned Chambers Judge erred in finding that the Crown's election to proceed summarily and the Appellant's pleas of not guilty were void and in failing to find that the learned Provincial Court Judge had jurisdiction to accept and act upon the election and to accept a plea.

2. The learned Chambers Judge erred in finding that the information remained a valid information charging an indictable offence.

3. The learned Chambers Judge erred in finding that the learned Provincial Court Judge had jurisdiction to strike out the election by the Crown to proceed summarily and the not guilty plea of the Appellant, and to proceed with the information by way of indictment after the proceedings had been conducted summarily from January 27th, 1992 until June 29th, 1992.

[para15] In its factum the respondent Crown raised an additional issue as follows:

4. The learned Chambers Judge erred in concluding that section 82 of the *Fisheries Act* only governs circumstances in which the Crown proves that the Minister is aware of the subject matter of the charge.

[para16] When the appeal came on for hearing, we asked counsel to address first the issue as to the correct interpretation of s-s.82(1), the limitation issue. Then we asked counsel to address what order ought properly to be made if we were to conclude that the respondent should succeed on the limitation issue. We reserved judgment on both of those issues, and advised counsel that, depending upon their resolution, we would if necessary hear them in full on the other issues which the appellant raises. In view of the disposition that I would make of the first two issues, I do not consider that any further hearing is necessary.

IV

Subsection 82(1) of the *Fisheries Act*

[para17] The respondent Crown says that both the learned Provincial Court Judge and the learned chambers judge erred in their interpretation of s-s.82(1) of the *Fisheries Act*. The respondent says the clear legislative intent was to provide a minimum two-year limitation period for proceeding by way of summary conviction, and that that minimum period might be extended for a period of time up to two years after the date on which "... the Minister became aware of the subject-matter of the proceedings."

[para18] Counsel said the provisions of s-s. 82(2), permitting proof by certificate of the date upon which the Minister became aware of the subject matter of the proceedings, would be applicable only in those cases where the Crown sought to extend the limitation period beyond the two- year minimum.

[para19] For the appellant, counsel contends that before any time limitation period under s-s.82(1) began to run, there must first be a "triggering event". That triggering event, says the appellant, is the Minister's becoming aware of the subject matter of the proceedings. In the absence of proof as to the Minister's awareness, s. 82 provides for no limitation period. In those circumstances, relying upon s-s.34(2) of the *Interpretation Act*, the appellant says that s-s.786(2) of the *Criminal Code* applies, and the limitation period for this summary conviction offence is six months. That was the view held by both the learned Provincial Court Judge and the learned chambers judge, and the appellant supports it.

[para20] With respect to contrary opinion, it is my view that this latter interpretation of s-s.82(1) is unreasonable and cannot be sustained. It would result in a six-month limitation period, followed by an indefinite period in which summary conviction proceedings would be barred, followed by a two-year limitation period commencing with awareness in the Minister of the subject matter of the proceedings.

[para21] A limitation period provides an end date, and not a start date. The Minister could not become aware of the subject matter of the proceedings before it occurred. He or she could become aware of the subject matter only on or after the date of its occurrence. Assuming the Minister's awareness at the time of the event, the minimum limitation would be two years. In the absence of evidence to the contrary, such an assumption is reasonable and in accord with common sense. If the Crown sought to proceed summarily outside that minimum two-year limitation period, it would have to show that the minimum period had been extended. Subsection 82(2) permits the Crown to do so upon proof that the Minister did not become aware until some date after which the two-year period would commence to run.

[para22] That interpretation of s-s. 82(1) is supported by looking at the predecessor section, before the amendments of 1 February 1991. The predecessor section provided:

> Any proceedings by way of summary conviction in respect of an offence under this *Act* may be instituted at any time within but not later than two years after the time when the subject-matter of the proceedings arose. R.S., c. F-14, s. 64; R.S., c. 17 (1st Supp.), s. 8.

[para23] This provision covered all circumstances and therefore amounted to a complete code. It was not necessary to refer to the six-month month limitation period set out in the *Criminal Code* in relation to fisheries offences because the *Fisheries Act* "otherwise provided."

[para24] Section 82 was amended by S.C. 1991, c. 1, s. 26. This legislation contained a number of provisions designed to strengthen and extend the enforcement capabilities of the *Fisheries Act.* The maximum penalties for offences under the *Act* were increased.

[para25] It is not logical that Parliament intended to revert back to a six-month limitation period under subsection 786(2) of the *Criminal Code,* considering the long history of the two-year limitation period for summary conviction proceedings under the *Fisheries Act*. Nor would such a reversion accord with the tenor of the other changes made to the *Act* in 1991. The thrust of those amendments was to strengthen and extend rather than weaken and restrict the Crown's powers of enforcement.

[para26] In *R.* v. *Aqua Clean Ships Ltd.* (29 July 1993), Vancouver 27584C (B.C. Prov. Ct.), His Honour Provincial Court Judge Bastin considered the limitation provisions in s-s. 117(1) of the *Canadian Environmental Protection Act,* R.S.C. 1985 (4th Supp.), c. 16, as amended. That limitation section is phrased in terms identical to those found in s-s. 82(1) of the *Fisheries Act.* The learned Provincial Court Judge in that case held that s-s. 117(1) provided for a limitation period of at least two years "... and longer under certain circumstances."

[para27] In my respectful view that is the correct interpretation of this language.

[para28] It was an error to conclude that s-s. 82(1) of the *Fisheries Act* required proof of the Minister's awareness before the two-year limitation period commenced. The subsection creates a minimum two-year limitation period for proceeding by way of summary conviction. That minimum period may be extended upon proof, as contemplated by s-s. 82(2), of the Minister's awareness for a period of up to two years beyond the date of that awareness.

[para29] In my respectful view the learned Provincial Court Judge erred when he concluded that the matter could not be proceeded with by way of summary conviction.

[para30] It is therefore necessary to determine what order ought properly to be made in the circumstances.

V

The Order to be made

[para31] Crown counsel says the appropriate remedy is to refer the case back to the Provincial Court for a summary conviction trial, on the original Information.

[para32] Counsel for the appellant says that there should be no referral to the Provincial Court for a summary conviction trial on the original Information. In support of this position, the appellant makes three arguments. They are:

1. the Provincial Court is functus, and the original information should be treated as though it had never been sworn or laid;
2. the provisions of the *Criminal Code* do not authorize the Court of Appeal to make the order for which the Crown contends; and
3. even if the Court of Appeal has a power under the *Code* to refer the matter back to the Provincial Court, it is a discretionary power which should be exercised against the Crown in the circumstances of this case.

[para33] On the first issue, counsel for the appellant says the Provincial Court Judge exceeded his jurisdiction by proceeding to hold a preliminary inquiry, and so lost jurisdiction over the offence alleged in the Information. The original Information is therefore void and must be treated as though it had never been laid. Counsel says that if the Crown wishes to proceed summarily, it must swear a new Information.

[para34] On the second issue, whether this Court has a power under the *Criminal Code* which would permit it to refer the case back to Provincial Court, in the event that the Information is still valid, counsel for the appellant says that there is no such statutory power. He points out that this is an appeal from the Supreme Court chambers judge's refusal of relief by way of certiorari. The chambers judge refused to quash the indictment or the committal for trial. Counsel says that if the judge erred on the limitation issue, the only appropriate remedy for this Court is to prohibit the Provincial Court from proceeding by way of indictment. Counsel says that to return the matter to

the Provincial Court for summary conviction trial now would in effect afford the Crown relief by way of mandamus. The Crown has not sought, and could not now seek, mandamus because the six-month time limit for doing so has passed. On the certiorari hearing before the chambers judge the appellant pointed out that there was no application by the Crown for mandamus, and the Crown did not pursue that line of argument.

[para35] On the third issue, counsel for the appellant says that even if this Court has a power under the *Criminal Code* to refer the case back to the Provincial Court for trial on summary conviction, the Court should refuse to exercise its discretion to do so. In exercising its discretion, if there is one, to return the matter to Provincial Court, counsel for the appellant says this Court should consider the following factors:

1. the offence alleged is relatively minor;
2. the accused came prepared for trial on the date set;
3. instead of a trial there was a five-day preliminary inquiry, with its attendant expense;
4. the Crown has not been diligent in pursuing matters by way of summary conviction; and
5. the Crown did not seek mandamus.

Now, over one year after the original trial date and over one year after the time limit for mandamus went by, the Crown, in effect, seeks that relief which is statute barred. The accused says that in all these circumstances the Court should exercise its discretion against referring the matter back to the Provincial Court.

[para36] In my view, the answer to the appellant's first point is found in s-s. 485(1) of the *Criminal Code*. That section reads:

> 485. (1) Jurisdiction over an offence is not lost by reason of the failure of any court, judge, provincial court judge or justice to act in the exercise of that jurisdiction at any particular time, or by reason of a failure to comply with any of the provisions of this *Act* respecting adjournments or remands.

[para37] Here, the Provincial Court Judge had jurisdiction under the *Fisheries Act* to try the case summarily. Because he held a mistaken view of the time limit for doing so, he felt that he could not proceed summarily. He thus failed to act in the exercise of that jurisdiction within the time limited for doing so. On a plain reading of s-s. 485(1), the Provincial Court did not lose jurisdiction in the circumstances.

[para38] Counsel for the appellant says that s-s.485(1) was not intended to apply to a case such as this. He says the subsection was enacted so as to prevent loss of jurisdiction which would otherwise result from administrative or clerical errors. He says the section was enacted as a cure

and in response to cases such as *Doyle* v. *R.*, [1977] 1 S.C.R. 597, (1976), 29 C.C.C. (2d) 177, 35 C.R.N.S. 1, 68 D.L.R. (3d) 270, and *R.* v. *Krannenburg*, [1980] 1 S.C.R. 1053, 51 C.C.C. (2d) 205, 17 C.R. (3d) 357, 108 D.L.R. (3d) 333, [1980] 2 W.W.R. 651. He says the subsection was not intended to apply where the failure to act resulted from a judicial or legal error of a serious nature, such as occurred here. No authority is cited to support the interpretation of s-s. 485(1) for which the appellant contends.

[para39] I would not give effect to this argument because in my view, on a plain reading, s-s. 485(1) applies.

[para40] The second point argued is that this Court does not have jurisdiction to make the order sought by the Crown remitting this case to the Provincial Court for trial on summary conviction. The order from which the appellant brings this appeal is one in which the Supreme Court Judge, in chambers, dismissed the appellant's application for certiorari. The appellant's argument is that this Court's jurisdiction is therefore limited to two alternatives. It may allow the appeal, grant an order in the nature of certiorari, and quash the order of the Provincial Court Judge committing the appellant to stand trial. Or, the Court may dismiss the appeal, refuse certiorari, and permit the appellant's trial by way of indictment to proceed. The appellant claims that these are the only two dispositions open to this Court, and that it may not, in particular, make the order sought by the Crown returning the case to Provincial Court for trial by way of summary conviction proceedings.

[para41] The relevant provisions of the *Criminal Code* on this issue are s-ss. 784(1) and (2):

> 784 (1) An appeal lies to the court of appeal from a decision granting or refusing the relief sought in proceedings by way of mandamus, certiorari or prohibition.
>
> (2) Except as provided in this section, Part XXI applies, with such modifications as the circumstances require, to appeals under this section.

[para42] Subsection 784(2) brings into play, inter alia, s-s. 683(3) of the Code, which reads:

> 683 (3) A court of appeal may exercise, in relation to proceedings in the court, any powers not mentioned in subsection (1) that may be exercised by the court on appeals in civil matters, and may issue any process that is necessary to enforce the orders or sentences of the court, but no costs shall be allowed to the appellant or respondent on the hearing and determination of an appeal or on any proceedings preliminary or incidental thereto.

[para43] The powers which might be exercised by this Court in a civil case include the powers contained in s. 9 in the *Court of Appeal Act* and therefore (on an application for certiorari) the powers contained in the *Judicial Review Procedure Act*, R.S.B.C. 1979, c. 209, as amended. Section 5 of that *Act* provides:

> Power to remit
>
> 5. (1) On an application for judicial review in relation to the exercise, refusal to exercise, or purported exercise of a statutory power of decision, the court may direct the tribunal

> whose act or omission is the subject matter of the application to reconsider and determine, either generally or in respect of a specified matter, the whole or any part of a matter to which the application for judicial review relates.

[para44] I therefore conclude that by virtue of s-s. 683(3) this Court could remit the case to the Provincial Court with a direction that it reconsider its jurisdiction to proceed by way of summary conviction proceedings in accordance with the opinion of this Court as expressed above. Having concluded that summary conviction proceedings were not barred by any time limitation, and that the Provincial Court retained jurisdiction by the application of s-s. 485(1), the Provincial Court could then proceed to try the appellant on the original Information by way of summary conviction.

[para45] I would therefore not give effect to the second point argued by the appellant.

[para46] The final question is whether this Court should exercise a discretion to refer the case back to the Provincial Court for trial on summary conviction proceedings. The Crown agrees that the power to do so is discretionary. However, the Crown does not concede any lack of diligence on its part. It says it has always taken the position that the case should be proceeded with by way of summary conviction. It was only when the learned Provincial Court Judge held that it could not do so that the Crown agreed to proceed by way of indictment. Once the Judge made his ruling, it was not open to the Crown to adopt a contrary position and to attempt to proceed summarily.

[para47] In the unusual circumstances of this case, it would in my view be unfair now to require the appellant to submit to a trial on summary conviction proceedings in the Provincial Court. I do not think the unfairness arises from anything which the Crown has, or has not, done. It arises rather because of the lapse of time from the date of the alleged offence in early 1991, almost three years ago, and the expense to which the appellant has already been put in defending itself upon the preliminary inquiry, and in pursuing prerogative writ relief in the Supreme Court of British Columbia and in this Court. The delay and expense resulted from the misinterpretation of s-s. 82(1) of the *Fisheries Act* by the learned Provincial Court Judge.

[para48] I would set aside the order of the Chambers judge and direct that all further proceedings on the original Information be stayed.

ONTARIO COURT OF JUSTICE – GENERAL DIVISION

[Indexed as: R. v. Boise Cascade Canada Ltd.]

Between Boise Cascade Canada Ltd., Appellant, and Her Majesty The Queen, Respondent

Platana J.

Fort Frances, June 3, 1994

***Fisheries Act*, R.S.C. 1985, c. F-14, ss 35, 36(3), 36(4), 78.6 – charge under s. 36(3) of depositing a deleterious substance – accused had permit under *Public Lands Act* – whether abuse of process – stay granted**

Defences – due diligence – defence not available when accused operating under provincial permit – could not carry on activity without breaching *Fisheries Act*

Criminal procedure – abuse of process – test whether fair and just – not fair and just to be charged by same authority who granted permit under different legislation

Summary: The Appellant was charged under s. 36(3) of the *Fisheries Act* with depositing or permitting the deposit of a deleterious substance into waters frequented by fish… The Appellant was a logging company operating in the Manitou Forest Management area and had constructed, through an independent contractor, a culvert crossing in an unnamed stream. The Appellant had been issued a work permit by the Ontario Ministry of Natural Resources under the *Public Lands Act* to construct water crossings, including a culvert stream crossing on the Whalen Road. The same provincial department charged the Appellant under the *Fisheries Act* following the deposit of sediment into the stream during construction.

Following the trial, the Appellant brought a motion requesting that the Justice of the Peace issue a stay of proceedings based on an abuse of process. The motion was denied and the Appellant found guilty. This is an appeal from conviction. The Appellant was also charged under the *Public Lands Act* with violating various terms of its permit and entered a plea of guilty.

The Appellant argued that the learned Justice of the Peace erred in finding that the defence of due diligence was available under s. 78.6 of the *Fisheries Act* because that defense is only available where a consequence occurs which itself is not necessarily permitted by legislation. The court agreed that no matter how diligently the company did its work it could not avoid deposit of sediment into the stream during construction of the culvert and thus, could not avoid violating the *Fisheries Act*. While s. 36(4) anticipates regulations permitting the deposit of deleterious substances, none had been passed. The court found that due to the gap in the regulatory process and in the way the two pieces of legislation are administered by the Province, that it would not be fair and just to allow the same administering authority to both permit an act and subsequently charge the Appellant with an offence for doing that which was permitted.

Held: Appeal allowed and the proceedings stayed.

REASONS/MOTIF:

Clare Brunetta, Counsel for the Respondent
Paul Cassidy, Counsel for the Appellant

[para1] PLATANA J.:-- The Appellant, Boise Cascade Canada Ltd, Appeals from a conviction on July 23, 1993, on a charge of depositing a deleterious substance into waters frequented by fish contrary to Section 36(3) of the *Fisheries Act*, R.S.C. 1985, Chapter F-14 as amended.

[para2] 36(3) Subject to Sub. Section (4)

> "No person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any such water.

[para3] Following a trial, which proceeded on the basis of an agreed statement of facts and certain exhibits which were filed, the Appellant brought a Motion requesting that the Justice of The Peace Stay Proceedings based on an abuse of process.

[para4] The Motion was denied and the Appellant was found guilty.

[para5] The Appellant is a company duly incorporated to carry on business in the Province of Ontario and has carried out extensive logging and associated activities in the Manitou Forest Management area either directly or indirectly through its servants or agents.

[para6] The Ontario Ministry of Natural Resources has charge of the management, sale and disposition of the public lands and forests of Ontario. Work permits are issued by the Ministry to individuals or corporations to carry out activities as described in the permit on public lands. This Ministry also administers the Federal *Fisheries Act.*

[para7] On or about March 22, 1991, a work permit No. FF-1991-91-18.00 was issued to the Appellant by the Ontario Ministry of Natural Resources pursuant to Section 14 of the *Public Lands Act*, R.S.O. 1990, C.P. 43, to construct water crossings, including a culvert stream crossing on the Whalen Road. A further work permit was issued extending the time for such work to be completed. The unnamed stream is acknowledged to fall within the definition of 'water frequented by fish' under Section 36(3) of the *Fisheries Act.*

[para8] Following the issuance of the permit, the Appellant contracted with an independent contractor to construct the culvert stream crossing. Construction commenced in the summer of 1991 and was substantially completed in late November of that year. By that time, a large amount of fill had been placed over the culvert.

[para9] The stream over which the culvert was constructed flows into Bat Lake. This lake contains numerous fish species as documented in a 1976 lake survey, angler checks by conservation officers and seine net checks at the stream mouth.
[para10] It is obvious that the deposit of fill or sediment of some type and amount during culvert stream crossing construction is a necessary consequence of such construction. A deposit of sediment into waters frequented by fish during construction could not be avoided.

[para11] The construction of the culvert stream crossing resulted in the release of deleterious substances, namely sediment, into the stream between June 1st of 1991 and August 20th of 1992.

[para12] The construction of this culvert stream crossing was carried out under the authority of the previously noted permit issued under the *Public Lands Act*. The Appellant was also charged with violating certain conditions of the permit issued and in fact has entered a plea of guilty to a charge under Section 14 (A)(1)(b) of the *Public Lands Act*. At trial, defense counsel's argument was that the work permit issued allowed the dumping of fill into the water to hold the culvert in place.

[para13] Section 78.6 of the *Fisheries Act* provides:

> 78.6 Due diligence defence. - No person shall be convicted of an offence under this Act if the person establishes that the person
>
> (a) exercised all due diligence to prevent the commission of the offence; or
>
> (b) reasonably and honestly believed in the existence of facts that, if true, would render the person's conduct innocent.

[para14] Counsel then further argued that the defense of due diligence or reasonable care as provided in this Section 78.6 was for all practical purposes not available to the Appellant in this case. His argument is that due diligence only applies in circumstances where a consequence occurs, which consequence in and of itself is not necessarily permitted by legislation.

[para15] In reviewing that submission at trial, the learned Justice of the Peace noted specifically that since Section 78.6 provided a due diligence defense this charge was therefore one of strict liability. He went on to indicate that the defense of due diligence had not been made out and accordingly entered a conviction.

[para16] In addition to the argument as to the applicability of the due diligence defense, the accused also argued that it ought to have been entitled to an acquittal on the basis of the defense of officially induced error. The basis of that defense lies in the fact that the Ministry of Natural Resources issued a permit for work to be done with respect to constructing a culvert, and then that same government agency subsequently laid the charge under the *Fisheries Act* charging the Appellant with the very nature of the work for which they themselves had issued a permit. At trial, the Justice of the Peace simply noted that the evidence in this case did not justify such a finding.

[para17] On this Appeal both counsel have indicated to me that the Appeal turns on an interpretation of the decision in *R.* v. *MacMillan Bloedel (Alberni) Ltd.* (1979), 47 C.C.C. (2nd) (110) (B.C.C.A.). The specific reference referred to by both counsel occurs at page 121 of that decision where the Court states:

> "The purpose of this legislation is to prevent waters being rendered deleterious to fish and that, if given the plain meaning of the words, an absurdity will result. It is said that if a teaspoon of oil was put in the Pacific Ocean, and oil was a deleterious substance, that would constitute an offence. In its submission that absurdity can be avoided by reading the Act to require that the water be made deleterious. There are some attractions to that reasoning, but I think that the result would be as at least as unsatisfactory."

At page 122,

> "Had it been the intention of Parliament to prohibit the deposit of a substance in waters so as to render that water deleterious to fish, that would have been easy to express. A different prohibition was decided on. It is more strict. It seeks to exclude each part of the process of degradation. The thrust of the section is to prohibit certain things, called deleterious substances, being put in the water. That is the plain meaning of the words used and is the meaning that I feel bound to apply."

[para18] Counsel for the Appellant submits that on the basis of MacMillan Bloedel, as soon as any deleterious material is put into waters, the offence is made out. He submits that the due diligence defense is aimed at the situation where someone is constructing something near to a body of water and where, after a deposit has occurred, it is shown that it could have been avoided if all reasonable care had been taken. He then goes on to suggest that in this situation, the very activity involves putting sediment into the water and that therefore the Section 78.6 due diligence defense cannot apply.

[para19] Section 36(4) contains provisions for regulations to be made allowing the deposit of deleterious substances in certain circumstances.

> 36(4) - "The Governor and Counsel may make regulations for the purpose of:
>
> (b) prescribing:
>
> a) a deleterious substance or classes thereof authorized to be deposited not withstanding Sub. Section (3)."

No such regulations have been put into effect under this Sub-Section. The effect of this, counsel submits, is that at this time there cannot be permitted any culvert stream crossings under the provisions of the *Fisheries Act*. It is impossible to even apply for a permit to come within Section 36(4).

[para20] It is on this basis that counsel suggests the learned Justice of the Peace erred in law in determining that the due diligence defense was available to the Appellant at the trial of this matter. Counsel suggests that there is a gap in the regulatory process and what has happened in this case is

that the Ministry of Natural Resources has issued a permit under the provisions of the *Public Lands Act* of the Province of Ontario to carry out an activity the very nature of which contravenes Section 36 of the *Fisheries Act*. Counsel submits that even in the event that a permittee complies completely with the conditions of any permit issued under the *Public Lands Act*, there is still an automatic breach of section 36 of the *Fisheries Act* to which the defendant is not entitled to raise any defense.

[para21] The Respondent acknowledges that a strict reading of Section 36(3) would appear to create an absolute liability offense and since the legislature has not deemed it appropriate to pass any regulations to take it out of the realm of absolute liability it becomes absurd. He suggests that if the defendant had acted in a commercially reasonable manner then the defense would be available to him. He submits that in the absence of regulation I must look at what happened in the facts of this case and apply these to the existing common law.

[para22] The Respondent acknowledges that the Appellant in this case could not have constructed this culvert stream crossing without violating the *Fisheries Act*. He argues that due diligence does not mean not depositing anything into the water, but that it means minimizing the impact by following the guidelines that are put in place, by doing it in a reasonable manner, as a reasonable man ought to to minimize the effect of the impact. The Respondent further indicates in his submissions that if I accept the Appellant's interpretation of MacMillan Bloedel, that any speck of oil in the ocean constitutes the offense and that one cannot absent themselves from that, then I should indeed give weight to the Appellant's request for a Stay.

[para23] The Respondent's interpretation of the *Fisheries Act* is that when a deleterious substance is deposited into water, the elements of the offense have been satisfied but that there is still then a defense available under Section 78.6. He suggests to me that this case boils down to one simple element. If the defense can establish that it took whatever steps are reasonable under the circumstances of this particular construction to minimize the impact, to minimize the amount of substance into the water, then the due diligence is available and the accused ought not to have been convicted.

[para24] The Respondent refers me to *R.* v. *Rayonier Canada Ltd.*, an unreported decision of the British Columbia Provincial Court for the proposition that participation by Federal Officials in the formulation of pollution standards for inclusion in a Provincial License granted to the accused does not preclude the Federal Crown from laying charges under the Federal Legislation even if compliance with the Provincial instrument would still have resulted in violation of the Federal Enactment. The trial judge in *Rayonier* determined that there had been no abuse of process and the trial was ordered to proceed. Counsel did not provide me with the facts of that case.

[para25] The Respondent also refers me to the decision in *Regina* v. *Pioneer Timber Company Ltd.*, Fisheries Pollution Reports, 279,

> "An offense prescribed under Section 33(2) of the *Fisheries Act* is a public welfare offense where proof of mens rea is not necessary, leaving it open to the accused to avoid liability by proving that it took all reasonable care."

[para26] The Section of the Act in that case read as follows:

> "33(2) subject to Sub. Section (4), no person shall deposit or permit the deposit of a deleterious substance of any type frequented by fish or in any place under any conditions where such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water."

[para27] The facts of that case as noted in the head-note are that the accused, while rebuilding an old logging road, deposited some blasted clay and gravel material on the lower side of the road directly above the head-wall of a tributary stream. The following day, during a spring thaw, a flood of water ran down the road surface and poured over the edge of the road, through the deposited material and into the tributary stream. Two conservation officers found that what had been a clear stream the day before was now dirty. The sediment causing the water to become dirty came from the clay and gravel deposit.

[para28] Further in, *Regina* v. *Connor Farms* Ltd., Fisheries Pollution Reports, 23, the accused corporation had authorization under Provincial Water Rights Legislation to construct and operate a dam. It was determined that the Company took no reasonable steps to ensure a flow of water through the dam and into a creek which contained salmon fry. Fry were destroyed as a result of the loss of water. The Corporation was charged under the *Fisheries Act*.

[para29] The British Columbia County Court held that authorization to construct and operate a damn under Provincial Water Rights Legislation did not relieve the accused of liability under the Federal *Fisheries Act*.

[para30] In *R*. v. *Jack Cewe Ltd.*, 4 Fisheries Pollution Reports, 271, the accused was acquitted after raising the defense of due diligence to a charge under Section 33(2) of the *Fisheries Act*. The accused owned a gravel pit operation and was charged with depositing material from the outfall of a culvert to a river. However, the Court did not accept the inference that the matter coming out of the culvert was coming solely from the sediment stock pile located on the accused company's property. The Court also held that the Company took all reasonable steps to contain and solve their environmental problem in allowing the defense.

[para31] In my view, these cases can be distinguished from the situation where an accused intentionally deposits a deleterious substance into water. With respect to this offence, that means that an accused can rely on this defence only if it can be demonstrated that all reasonable care was taken to avoid the deposit of the deleterious substance, in this case, the fill. No matter how diligently the Appellant's construction activities were undertaken, the construction of the culvert stream crossing necessarily required the deposit of the fill. The Appellant could not have obtained a permit to do so under Section 36(4) since no regulations have been passed thereunder.

[para32] That does lead to the situation that the only way the Appellant could avoid the commission of the offence in these facts was to refrain from building the crossing.

[para33] We are then faced with the situation that such crossings are required for development, not only by this Appellant but by others who require to build roads to cross streams to carry out

their business undertakings. Indeed, many operations in this Province require such streams to be crossed and the only practical way to do so is by way of such type of crossing.

[para34] There indeed appears to be a gap in the regulatory process and in the way these two pieces of legislation are administered by the Province. On the one hand, there is no way that a culvert stream crossing can be constructed without attracting liability under the *Fisheries Act*. On the other hand, the same Provincial body to whom authority for enforcement under such Act has been delegated, issues permits to construct such crossings.

[para35] It is important for my determination of this Appeal to note the manner in which all charges against this Appellant were dealt with. Charges were laid both under the *Fisheries Act*, and the *Public Lands Act*. The charges under the *Public Lands Act* resulted in pleas of guilty. It may well be on the basis of cases cited by the Respondent, that had charges been laid only under the *Fisheries Act*, the Appellant may not have been in a position to plead that permission by a Provincial authority allows the breach of a Federal statute. However, the situation, in my view, is very different where the same enforcement authority lays charges under both Federal and Provincial Acts.

[para36] Counsel for the Respondent has argued that if the Appellant had complied with the terms of the permit issued under the *Public Lands Act* and had taken reasonable care, no charges would have been laid under the *Fisheries Act*. That argument is unacceptable. Any person is entitled to proceed with their actions without having the concern of knowing that to do so violates a statute and that the prosecution of same is totally dependent upon a discretionary decision by the enforcement authority.

[para37] I recognize that the impact of this decision will, in essence, if I accept the argument of the Appellant, mean that no culvert stream crossings can be constructed without violating the *Fisheries Act*, whether or not a permit is issued under the *Public Lands Act*. That is a problem for the legislation to contend with by passing the appropriate regulations of the *Fisheries Act*. Counsel have advised that subsequent to the charge being laid in this matter, regulations have been passed under Section 35 of the Act which deals with the harmful alteration, disruption or destruction of fish habitat but that no similar regulation has been passed under Section 36. Since there was no regulation in effect in the time frame of this charge, it is not necessary for me to determine the affect of the regulation now passed on Section 36.

[para38] The Appellant requests that this appeal be allowed on the basis of abuse of process. Counsel refers me to *Regina* v. *Northwood Pulp Timber Ltd.*, an unreported decision of His Honour Judge R.B. Macfarlane, in the Provincial Court of British Columbia:

> "By the very nature of the pulping process, toxicants are released into the environment."

From page 14,

> "The state of the law with respect of abuse of process is to be found in the Ontario Court of Appeal case *RE: Abitibi Pulp and Paper and the Queen*, 47 C.C.C. (2nd) at 407. Mr. Justice Jessep at page 495, having found that in the prosecution of a provincial statute: 'a

> provincial judge had jurisdiction to Stay Proceedings before him for abuse of process...' concluded at page 496,
>
> 'The cases use such adjectives as vacuous, unfair, oppressive and now 'most exceptional circumstances' in describing conduct deemed to be an abuse of process...'
>
> In my opinion, the conduct of the crown in this case, in breach of an undertaking by one of its senior officers, attracts each of the adjectives I have mentioned.".

From page 15,

> "Thus, the law has settled that the accused must establish on a balance of probabilities that prosecuting the company for breach of the total suspended solids parameters and their permit is so offensive in the circumstances as to be an abuse of process."

Counsel has also referred to me the decision in *R.* c. *Gravel Chevrolet Oldsmobile Inc.* 8 C.R. (4th), 316,

> "Considering the exceptional circumstances of the case, the proceedings should be Stayed without discussing the validity of the officially induced error. The State, which has full knowledge of an advertising contest that a person is about to manage, cannot approve it by requiring the payment of a fee, despite its illegality, and then charge the person before a criminal court. The State cannot use the judicial process to obtain the conviction of a person induced into error by the system"

[para39] Further, in *R.* v. *D*(E) 73 O.R. (2nd), 758 at 767,

> "A finding of abuse of process requires a delicate balancing of rights and interests, not in the abstract, but in the context of society's changing perception of what is fair and just."

[para40] Government regulatory process can often be complicated to understand and may at times lead to confusion. Whether or not the Appellant complied with the terms of any permit issued is irrelevant. In the strict wording of Section 36(3) of the *Fisheries Act*, no permit should have been issued under the *Public Lands Act*. The argument that if the permit had been complied with, charges under the *Fisheries Act* would not have been laid is also irrelevant.

[para41] In circumstances such as this, it is in my view not fair and just that the Appellant should be required to face a charge of having committed an offence by doing the very act which it was permitted to do by the same administering authority.

[para42] This Appeal is therefore allowed and the proceedings are stayed.

NORTHWEST TERRITORIES SUPREME COURT

[Indexed as: R. v. Northwest Territories (Commissioner) #5]

Between Her Majesty the Queen on the information of Neil Bruce Scott, Enforcement and Compliance Officer, Respondent and Cross-Appellant, and The Commissioner of the Northwest Territories, Appellant and Cross-Respondent

de Weerdt J.

Yellowknife, July 22, 1994

***Fisheries Act*, R.S.C. , c. F-14, ss 2, 34(1), 36(3), 36(4), 36(5), 40(2)(a), 40(5)(a), 78.6, 79.2(f) – whether s. 36(3) is constitutionally vague – is a valid exercise of federal authority under s. 91(12) of the *Constitution Act, 1867* – conviction under the act is not inevitable once a decision is made to prosecute – section does not lack fair notice to citizens or create a "standardless sweep" – act of "permitting" a deposit under s. 36(3) – lack of action to prevent the deposit ..., which ought to have been foreseen and could have been prevented through due diligence, is an offence**

***Northern Inland Waters Act*, R.S.C. 1985, c. N-25, ss 2(1), 7, 8(1), 11, 29 – definition of "waters" – use of "waters" under this act does not authorize use of "internal waters" on the seacoast in "Canadian fisheries waters" under the *Fisheries Act* – scope of licenses – scope is restricted to the legislative scope of the statute**

***Canadian Charter of Rights and Freedoms, 1982*, ss 1, 7, 24(1) – whether provision unconstitutionally vague – s. 36(3) of the *Fisheries Act* meets established tests – test is whether the provision provides an adequate basis for legal debate – threshold for meeting this test is high**

Defences – necessity – no emergency where accused's fault consists of actions whose clear consequences actually occurred

Summary: This is an appeal from a conviction under s. 36(3) of unlawfully depositing or permitting the deposit of a deleterious substance (sewage) in water frequented by fish (Koojesse Inlet) at or near Iqualuit, Northwest Territories on and between June 1 and June 10, 1991.

The appeal was limited to four issues. The first argument by the Appellant asserted that s. 36(3) of the *Fisheries Act* is unconstitutionally vague contrary to ss 1 and 7 of the *Charter of Rights and Freedoms*. The learned justice determined that there are two theoretical foundations for the doctine of vagueness: fair notice to the citizen and limitation of enforcement discretion. Fair notice constitutes both formal notice and substantive notice, which is an understanding that certain conduct is the subject of legal restrictions. A provision is constitutionally vague where it gives insufficient guidance for legal debate due to lack of precision. The threshold to be crossed before a provision is found to be constitutionally vague is high. S. 36(3) was not shown to lack fair notice to citizens or to create a "standardless sweep". Neither was s. 36(3) shown to have insufficient

limitations on its enforcement such that it did not lack sufficient precision that a conviction would automatically follow a prosecution.

The second challenge by the appellant was based on the argument that the accused was acting in compliance with a license granted under the *Northern Inland Waters Act*, whose provisions must prevail in the event of a conflict with the *Fisheries Act*, and in any event, he was exempted under s. 36(4) of the *Fisheries Act* as a licensee under another federal statute. The learned justice decided this point in favour of the respondents on two bases: one, the definition of "waters" in the *Northern Inland Waters Act* refers only to inland waters and could not authorize the Town of Iqaluit to use "internal waters" on the sea coast included in "Canadian fisheries waters" as defined in the *Fisheries Act*; and two, that nothing in the license absolves the licensee from complying with the *Fisheries Act*.

The third issue concerned whether the trial judge erred in law as to the test he applied in determining that the accused committed the actus reus of the offence charged. Focusing on three points, proof that the appellant "permitted the deposit", the substance was "deleterious" and it was in "water frequented by fish", the learned justice concluded that there was no merit in submissions that the actus reus of the offence was not established.

The last issue concerned whether the verdict reached by the trial judge was unreasonable and not supported by the evidence. The court accepted the appellant's submission that the evidence could not support a conviction for June 1, 1991 and amended the conviction to June 2, 1991. In respect to this issue, the learned justice disposed of five arguments as follows: (1) the trial judge did not err in failing to mention the defence of necessity given the evidence before him; (2) there was no substantial wrong or miscarriage of justice resulting from the trial judge's reference to a government report; (3) the trial judge exercised his discretion judicially when considering the appellant's application to reopen its case; (4) in a prosecution, the Crown is not estopped from challenging the validity of evidence produced by the Crown in right of Canada; and (5) it is too late, on appeal, to raise certain complaints of Crown non-disclosure of evidence.

Held: Appeal of the conviction was dismissed.

REASONS/MOTIF:

John Donihee and Priscilla Kennedy, Counsel for the Appellants
John D. Cliffe and Brett O. Webber, Counsel for the Respondents

de WEERDT J.:--

I. Introduction

[para1] The Commissioner of the Northwest Territories appeals against the conviction, entered against the Crown in right of Canada as represented by him, of unlawfully depositing or permitting the deposit of a deleterious substance (sewage) in water frequented by fish (Koojesse Inlet) at the Iqaluit sewage lagoon at or near the Town of Iqaluit in the Northwest Territories on and between

June 1st and 10th 1991, in violation of s.36(3) and contrary to s.40(2)(a) of the *Fisheries Act*, R.S.C. 1985, c. F-14.

[para2] Should that appeal fail, the Commissioner also appeals against the sentence imposed by the trial judge in the Territorial Court in respect of that conviction. The sentence consists of fines totalling $49,000 plus a penalty by way of payment order, pursuant to s.79.2(f) of the *Fisheries Act*, in the amount of $40,000. Neither of these amounts has been paid to date, an order of this Court suspending their payment until the appeals have been determined having been made on April 8th, 1994.

[para3] These appeals are opposed by the Crown represented by counsel on behalf of the Attorney General of Canada. And the Crown cross-appeals against the sentence mentioned.

[para4] To avoid confusion, I shall refer to the first mentioned appellant as "the Commissioner" and to the last mentioned appellant as "the Crown".

[para5] It may be mentioned that the Commissioner is the chief executive officer of the Northwest Territories pursuant to s.3 of the *Northwest Territories Act*, R.S.C. 1985, c. N-27, having the responsibility of administering the government of these Territories under instructions from time to time given by the Governor General in Council or the Minister of Indian Affairs and Northern Development of Canada, as provided by s.4 of the *Act*. The powers of the Commissioner include those vested before September 1st 1905 in the Lieutenant Governor or Lieutenant Governor in Council of the Northwest Territories, as declared by s.5 of the *Act*.

[para6] The conviction and sentence under appeal were entered in summary conviction proceedings governed by Part XXVII of the Criminal Code, under s.34(2) of the *Interpretation Act*, R.S.C. 1985, c. I-21. The appeals are therefore likewise governed by that Part.

[para7] For convenience of reference, each of the decisions of the trial judge now challenged on appeal is reported as *Canada (Environment Canada)* v. *Northwest Territories (Commissioner)*, [1994] 1 W.W.R. 430, 441 and 459; 12 C.E.L.R. (N.S.) 25, 37 and 55 (N.W.T. Terr.Ct.).

[para8] Submissions by counsel on the sentence appeals have been deferred pending the determination of the conviction appeal. What follows is therefore restricted to the conviction appeal.

II. Issues

[para9] Four issues call for determination:

1. Is s.36(3) of the *Fisheries Act* unconstitutionally vague?
2. Was the conviction precluded by the issuance of a licence pursuant to the *Northern Inland Waters Act*, R.S.C. 1985, c. N-25?

3. Did the trial judge err in law as to the test he applied to determine if the Commissioner committed the actus reus of the offence charged?

4. Was the verdict reached by the trial judge unreasonable and unsupported by the evidence?

III. Vagueness

1. Subsection 36(3) of the *Fisheries Act*

[para10] This provision reads:

> (3) Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deleterious substance may enter any such water.

[para11] Subsection 36(3) must of course be understood within its context. The immediate context, to which it refers, is subsection 36(4); and that subsection makes specific reference to subsection (5). These additional subsections read as follows:

> (4) No person contravenes subsection (3) by depositing or permitting the deposit in any water or place of
>
> > (a) waste or pollutant of a type, in a quantity and under conditions authorized by regulations applicable to that water or place made by the Governor in Council under any Act other than this *Act*; or (b) a deleterious substance of a class, in a quantity or concentration and under conditions authorized by or pursuant to regulations applicable to that water or place or to any work or undertaking or class thereof, made by the Governor in Council under subsection (5).
>
> (5) The Governor in Council may make regulations for the purpose of paragraph (4)(b) prescribing
>
> > (a) the deleterious substances or classes thereof authorized to be deposited notwithstanding subsection (3);
> >
> > (b) the waters or places or classes thereof where any deleterious substance or classes thereof referred to in paragraph (a) are authorized to be deposited;
> >
> > (c) the works or undertakings or classes thereof in the course or conduct of which any deleterious substances or classes thereof referred to in paragraph (a) are authorized to be deposited;
> >
> > (d) the quantities or concentrations of any deleterious substances or classes thereof referred to in paragraph (a) that are authorized to be deposited;

(e) the conditions or circumstances under which and the requirements subject to which any deleterious substances or classes thereof referred to in paragraph (a) or any quantities or concentrations of those deleterious substances or classes thereof are authorized to be deposited in any waters or places or classes thereof referred to in paragraph (b) or in the course or conduct of any works or undertakings or classes thereof referred to in paragraph (c); and

(f) the persons who may authorize the deposit of any deleterious substances or classes thereof in the absence of any other authority, and the conditions or circumstances under which and requirements subject to which those persons may grant the authorization.

2. The wider context: definitions

[para12] Section 34 of the *Fisheries Act* states:

34. (1) For the purposes of sections 35 to 43, "deleterious substance" means

(a) any substance that, if added to any water, would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water, or

(b) any water that contains a substance in such quantity or concentration, or that has been so treated, processed or changed, by heat or other means, from a natural state that it would, if added to any other water, degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water,

and without limiting the generality of the foregoing includes

(c) any substance or class of substances prescribed pursuant to paragraph (2)(a),

(d) any water that contains any substance or class of substances in a quantity or concentration that is equal to or in excess of a quantity or concentration prescribed in respect of that substance or class of substances pursuant to paragraph (2)(b), and

(e) any water that has been subjected to a treatment, process or change prescribed pursuant to paragraph (2)(c);

"deposit" means any discharging, spraying, releasing, spilling, leaking, seeping, pouring, emitting, emptying, throwing, dumping or placing;

"fish habitat" means spawning grounds and nursery, rearing, food supply and migration areas on which fish depend directly or indirectly in order to carry out their life processes;

"water frequented by fish" means Canadian fisheries waters.

(2) The Governor in Council may make regulations prescribing

> (a) substances and classes of substances, (b) quantities or concentrations of substances and classes of substances in water, and (c) treatments, processes and changes of water

for the purpose of paragraphs (c) to (e) of the definition "deleterious substance" in subsection (1).

[para13] The language of s.36(3), read in the context of s.34, is to be understood in accordance with the following specific definitions in s.2 of the *Act*:

2. In this *Act*,

> "Canadian fisheries waters" means all waters in the fishing zones of Canada, all waters in the territorial sea of Canada and all internal waters of Canada:
>
> "fish" includes shellfish, crustaceans, marine animals and the eggs, spawn, spat and juvenile stages of fish, shellfish, crustaceans and marine animals.

[para14] The expression "no person" in s.36(3) includes reference to the Commissioner. More precisely, as provided by s.3(2) of the *Act*:

(2) This *Act* is binding on Her Majesty in right of Canada or a province.

[para15] The term "province" includes the Northwest Territories, pursuant to s.35(1) of the *Interpretation Act*. It is therefore immaterial whether the Commissioner is classed as a representative of Canada or of the Northwest Territories, for purposes of s.36(3) of the *Fisheries Act*.

3. The test for unconstitutional vagueness

[para16] The Commissioner relies upon the unanimous decision of the Supreme Court of Canada in *R.* v. *Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, 74 C.C.C. (3d) 289, 15 C.R. (4th) 1, 93 D.L.R. (4th) 36, 10 C.R.R. (2d) 34, 43 C.P.R. (3d) 1, 114 N.S.R. (2d) 91, 31 A.P.R. 91, 139 N.R. 241 in support of his submission that subsection 36(3) of the *Fisheries Act*, as fisheries legislation, fails to delineate an area of risk and creates a "standardless sweep" of law enforcement, as interpreted by the courts to date, so that it is so vague and overbroad that a conviction almost surely follows from the decision to prosecute, all contrary to s.7 and s.1 of the *Canadian Charter of Rights and Freedoms*, which provide (in reverse order):

> 1. The *Canadian Charters of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[para17] In the Nova Scotia Pharmaceutical Society case it was held that "the threshold for finding a law vague is relatively high". Furthermore:

> The two rationales of fair notice to the citizen and limitation of enforcement discretion have been adopted as the theoretical foundations of the doctrine of vagueness ... These two rationales have been broadly linked with the corpus of principles of government known as the "rule of law", which lies at the core of our political and constitutional tradition.

a. Fair notice to the citizen

> Fair notice to the citizen, as a guide to conduct and a contributing element to a full answer and defence, comprises two aspects.
>
> First of all, there is the more formal aspect of notice, that is acquaintance with the actual text of a statute. In the criminal context, this concern has more or less been set aside by the common law maxim, "Ignorance of the law is no excuse", embodied in s.19 of the Criminal Code, see *R.* v. *MacDougall*, [1982] 2 S.C.R. 605, 1 C.C.C. (3d) 65, 142 D.L.R. (3d) 216. ... In any event, given that, as this court has already recognized, case law applying and interpreting a particular section is relevant in determining whether the section is vague, formal notice is not of central concern in a vagueness analysis.
>
> ... There is also a substantive aspect to fair notice, which could be described as a notice, an understanding that some conduct comes under the law ...
>
> Fair notice may not have been given when enactments are in somewhat general terms, in a way that does not readily permit citizens to be aware of their substance, when they do not relate to any element of the substratum of values held by society. It is no coincidence that these enactments are often found vague ...
>
> Hence, aside from a formal aspect which is in our current system often presumed, fair notice to the citizen comprises a substantive aspect, that is an understanding that certain conduct is the subject of legal restrictions.

b. Limitation of enforcement discretion

> ... A law must not be so devoid of precision in its content that a conviction will automatically flow from the decision to prosecute. Such is the crux of the concern for limitation of enforcement discretion. When the power to decide whether a charge will lead to conviction or acquittal, normally the preserve of the judiciary, becomes fused with the power to prosecute because of the wording of the law, then a law will be unconstitutionally vague.

* * *

d. The scope of precision

> This leads me to synthesize these remarks about vagueness. The substantive notice and limitation of enforcement discretion rationales point in the same direction: an unintelligible provision gives insufficient guidance for legal debate and is therefore unconstitutionally vague.
>
> ... Legal rules only provide a framework, a guide as to how one may behave, but certainty is only reached in instant cases, where law is actualized by a competent authority. In the meanwhile, conduct is guided by approximation. The process of approximation sometimes results in quite a narrow set of options, sometimes in a broader one. Legal dispositions therefore delineate a risk zone, and cannot hope to do more, unless they are directed at individual instances.
>
> By setting out the boundaries of permissible and non- permissible conduct, these norms give rise to legal debate. They bear substance, and they allow for a discussion as to their actualization. They therefore limit enforcement discretion by introducing boundaries, and they also sufficiently delineate an area of risk to allow for substantive notice to citizens.
>
> Indeed, no higher requirement as to certainty can be imposed on law in our modern state. Semantic arguments, based on a perception of language as an unequivocal medium, are unrealistic. Language is not the exact tool some think it is. It cannot be argued that an enactment can and must provide enough guidance to predict the legal consequences of any given course of conduct in advance. All it can do is enunciate some boundaries, which create an area of risk ...
>
> A vague provision does not provide an adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. It does not sufficiently delineate any area of risk, and thus can provide neither fair notice to the citizen nor a limitation of enforcement discretion. Such a provision is not intelligible, to use terminology of previous decisions of this court, and therefore fails to give sufficient indications that could fuel a legal debate. It offers no grasp to the judiciary. This is an exacting standard, going beyond semantics. The term "legal debate" is used here not to express a new standard or one departing from that previously outlined by this court. It is rather intended to reflect and encompass the same standard and criteria of fair notice and limitation of enforcement discretion viewed in the fuller context of an analysis of the quality and limits of human knowledge and understanding in the operation of the law.

e. Vagueness and the rule of law

> ... The doctrine of vagueness can therefore be summed up in this proposition: a law will be found unconstitutionally vague if it so lacks precision as not to give sufficient guidance for legal debate. This statement of the doctrine best conforms to the dictates of the rule of law

in the modern state, and it reflects the prevailing argumentative, adversarial framework for the administration of justice.

4. Applying the test

[para18] Recent decisions of our highest court which apply the test enunciated in the Nova Scotia Pharmaceutical Society case may be noted. In *R.* v. *Morales* (1992), 77 C.C.C. (3d) 91, 17 C.R. (4th) 74 (S.C.C.), the difficulties inherent in the doctrine of unconstitutional vagueness are illustrated by the dissenting reasons of Gonthier J. (L'Heureux Dubé J. concurring), especially since Gonthier J. had, only months before, written for the unanimous court in the Nova Scotia Pharmaceutical Society case. The court was also divided in *R.* v. *Finta* (1994), 20 C.R.R. (2d) 1 (S.C.C.), though there again the dissenting minority joined with the majority in applying Nova Scotia Pharmaceutical Society.

[para19] Both in the Nova Scotia Pharmaceutical Society decision and in *R.* v. *Finta* the court declined to strike down the impugned legislation as unconstitutionally vague. That ground of challenge succeeded, however, in *R.* v. *Morales*.

[para20] In the case of Nova Scotia Pharmaceutical Society the court upheld as valid, in the face of a challenge of unconstitutional vagueness, the somewhat generally expressed provisions of what is now s.45(1)(c), (2) and (2.2) of the *Competition Act*, R.S.C. 1985, c. C-34. The provisions there impugned were considered to be a pillar of the *Act*, which was held to be "central to Canadian public policy in the economic sector". It is noteworthy that the court made the point that s.45(1)(c), then s.32(1)(c),

> ... must not be taken in a vacuum. Its interpretation is conditioned, first of all, by the purposes of the *Act*. Furthermore, its content is enriched by the rest of the section in which it is found and by the mode of inquiry adopted by courts as they have ruled under it. These are matters of law ...

[para21] In *R.* v. *Morales*, Lamer C.J. for the majority held that the expression "public interest" had not received a consistent and workable meaning from the courts, as that expression appeared in s.515(10)(b) of the Criminal Code. To that extent, then, this provision was held to be unconstitutionally vague and, consequently, inoperative. And the rationale relied upon for the decision was the need for a limitation of law enforcement discretion. Once again it is noteworthy that the court sought an interpretation of the impugned legislation on the basis of decisions reached in the lower courts rather than by formulating one of its own.

[para22] Finally, in *R.* v. *Finta*, the court upheld the extraordinary jurisdiction conferred upon Canadian courts by s.7(3.71) of the Criminal Code to adjudicate prosecutions of war crimes and crimes against humanity committed outside Canada either before or after the enactment of that law. The expressions "war crime" and "crime against humanity", as defined by s.7(3.76) of the Code, were held not to be unconstitionally vague. Given the extraordinary reach of this legislation and the widely general scope of these definitions, this case therefore provides a recent illustration of the considerable height of the threshold to be crossed before a law may be declared inoperative on grounds of unconstitutional vagueness.

5. Application of the test in the instant appeal

[para23] Subsection 36(3) of the *Fisheries Act* was unanimously held to be a valid exercise of federal legislative authority pursuant to s.91(12) of the *Constitution Act*, 1867 in Northwest Falling Contractors Ltd., [1980] 2 S.C.R. 292, [1981] 1 W.W.R. 681, 53 C.C.C. (2d) 353, 113 D.L.R. (3d) 1, 32 N.R.541. Although decided before the advent of the *Canadian Charter of Rights and Freedoms*, that case is worthy of note for its examination of the definitions, in the *Fisheries Act* of that day, of the expressions "deleterious substance", "deposit", "fish" and "water frequented by fish", all of which were defined then as they now appear in s.36(3) of the *Act*.

[para24] In particular, the court declared in that case (referring to what is now s.36(3) of the *Act*):

> The definition of "deleterious substance" ensures that the scope of s.33(2) is restricted to a prohibition of deposits that threaten fish, fish habitat or the use of fish by man.

[para25] This disposes of any suggestion, in my respectful view, that s.36(3) is overbroad in the context of s.91(12) of the *Constitution Act*, 1867; and it goes a long way to dispose of the claim that s.36(3) is overbroad in reference to s.7 (or, if so, s.1) of the *Constitution Act*, 1982. There is no basis for equating s.36(3) with the legislation struck down either in *R.* v. *Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, [1988] 3 W.W.R. 385, 49 D.L.R. (4th) 1, 25 B.C.L.R. 145, 40 C.C.C. (3d) 289, 84 N.R.1 or in *Fowler* v. *The Queen*, [1980] 2 S.C.R. 213, [1980] 5 W.W.R. 511, 113 D.L.R. (3d) 513, 53 C.C.C. (2d) 97, 32 N.R. 230.

[para26] Counsel for the Commissioner argues that s.36(3) is demonstrably overbroad in view of the decision of the British Columbia Court of Appeal in *R.* v. *Western Stevedoring Company Ltd.* (1984), 3 F.P.R. 487, leave to appeal to S.C.C. denied May 7th 1984, see (1984), 4 F.P.R. 486 (S.C.C.), to restore a conviction for a violation of s.36(3), where the defendant had adduced evidence to show that the deleterious substance dumped by the defendant's employees had in fact not reached the water but had been contained in large drainage tanks, the outlet from which had yet to be reached by the liquid in the tanks. With great respect, I am unable to agree. The fact that the liquid level in the tanks could rise with the addition of more liquid (in the form of rain or other water, for example) was indicative of an existing risk that the deleterious substance "may enter" the water frequented by fish below the outlet. The risk was foreseeable and real, not merely speculative. In any event, there was also evidence that the deleterious substance had, in fact, entered the water (which was frequented by fish); and it was the trial judge's finding to that effect, based on that evidence, which determined the decision on appeal as it did at the trial level.

[para27] It is also the Commissioner's submission that the decision of the British Columbia Court of Appeal in *R.* v. *MacMillan Bloedel (Alberni) Limited* (1979), 4 W.W.R. 654, 47 C.C.C. (2d) 118, leave to appeal to S.C.C. denied June 19th 1979 (*ibid*), shows that s.36(3) is overbroad, since the court there held (it is submitted) that the meaning of "deleterious" in s.36(3) is "not related to a deleterious effect on fish". With great respect, I am unable to agree with this submission. Seaton J.A., delivering the judgment of the court, made the relationship of the expression "deleterious substance" to water frequented by fish perfectly clear, as follows:

> What is being defined is the substance that is added to the water, rather than the water after the addition of the substance. To rephrase the definition section in terms of this case: oil is a deleterious substance if, when added to any water, it would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that that water is deleterious to fish or to the use by man of fish that frequent that water.

[para28] As for the argument that s.36(3) creates a "standardless sweep" in legislation providing for a possible penalty of imprisonment, I note that the court in *R.* v. *Jack Cewe Ltd.* (1987), 4 F.P.R. 271 (B.C.Prov.Ct.) vividly demonstrated, by its acquittal, that a conviction is not inevitable once a decision has been made to prosecute an alleged violation of s.36(3) of the *Fisheries Act*. And, as counsel for the Crown has reminded the Court, s.78.6 of the *Act* provides:

> 78.6. No person shall be convicted of an offence under this *Act* if the person establishes that the person
>
> > (a) exercised all due diligence to prevent the commission of the offence; or (b) reasonably and honestly believed in the existence of facts that, if true, would render the person's conduct innocent.

[para29] No mention of *R.* v. *MacMillan Bloedel (Alberni) Limited* is made in the later decision of the Supreme Court of Canada in the Northwest Falling Contractors Ltd. case. That later decision does not, in my respectful view, either expressly or impliedly overrule the earlier decision. And the still later decision in *R.* v. *Jack Cewe Ltd.* is noteworthy for having been made, without hesitation or question, on the basis of *R.* v. *MacMillan Bloedel (Alberni) Limited*, some five years after the coming into force of s.7 of the *Constitution Act*, 1982.

6. Conclusion

[para30] The Commissioner's challenge to s.36(3) of the *Fisheries Act* on grounds of unconstitutional vagueness amounting to a breach of s.7 of the *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act*, 1982, must fail. The impugned legislation has not been shown to lack fair notice to the citizen, be it in formal or substantive terms; and it has not been shown to create a "standardless sweep" having insufficient limitations on its enforcement. Subsection 36(3) is not unintelligible; certainly, it is no less intelligible than the legislation upheld by our highest court in the Nova Scotia Pharmaceutical Society case and in *R.* v. *Finta*.

[para31] In coming to this conclusion, I have endeavoured to approach the challenge posed to the legislation without considering the circumstances of the offence charged, as revealed in the evidence. In doing so, I have followed the approach adopted in *Canadian Bar Assn.* v. *British Columbia (Attorney General)*; *Law Society of British Columbia* v. *British Columbia* (1993), 101 D.L.R. (4th) 410 (B.C.S.C.) per Lysyk, J. at page 438. However, I note that a contrary approach was adopted by the Ontario Court of Appeal in *R.* v. *Canadian Pacific Ltd.* (1993), 22 C.R. (4th) 238, 13 O.R. (3d) 389 sub nom. *Ontario* v. *Canadian Pacific Ltd.*, leave to appeal to S.C.C. granted on February 10th 1994. If this contrary approach should prove to be the more appropriate one, it is perhaps as well to say that it strongly reinforces the conclusion which I have already

reached using the more abstract and diffuse approach urged upon me by counsel for the Commissioner.

[para32] It is perhaps as well to add that I have reached the foregoing conclusion quite independently of the trial judge's reasons for his judgment dismissing the Commissioner's motion to quash or dismiss the information before the Territorial Court in this case on the ground that the information fails to disclose an offence known to law on the ground that s.36(3) of the *Fisheries Act* is unconstitutionally vague, in breach of s.7 of the *Constitution Act*, 1982, pursuant to s.24(1) of the latter enactment. Those reasons speak of an application to have s.36(3) "struck"; though that, it seems to me, was beyond the jurisdiction of the Territorial Court. That aside, I agree generally with the reasons of the trial judge; but I have endeavoured not to repeat them here since they are already reported as earlier mentioned.

IV. The Licence

1. The Commissioner's submission

[para33] It is submitted on behalf of the Commissioner that a contravention of s.36(3) of the *Fisheries Act* cannot be found, in law, when the act or omission giving rise to the contravention is in compliance with a licence validly granted pursuant to the *Northern Inland Waters Act*, R.S.C. 1985, c. N-25.

[para34] The trial judge held that the licence on which the Commissioner relies is irrelevant to the issues before the Court since the licence was not issued to the Commissioner (or to Her Majesty The Queen, as represented by the Commissioner) but was instead issued to the Town of Iqaluit.

[para35] This is not disputed by the Commissioner. It is the Commissioner's submission that he is nevertheless entitled to rely on the licence, since he was at all material times acting on behalf of the Town of Iqaluit in relation to the Iqaluit sewage lagoon and its operations.

[para36] Furthermore, it is said on behalf of the Commissioner that the *Fisheries Act* must be understood and applied harmoniously with the *Northern Inland Waters Act* so as to give due recognition and effect to a licence issued pursuant to the latter Act. If these statutes are in conflict, it is argued that the latter Act must prevail, not only because it was enacted later in time than the first mentioned *Act* but also because its licensing provisions are specific whereas s.36(3) of the *Fisheries Act* is general in scope. In any event, s.36(4) of that *Act* exempts the Commissioner as a licensee (or acting on behalf of a licensee) under another federal statute such as the *Northern Inland Waters Act*.

2. The Crown's position

[para37] Crown counsel opposes the Commissioner's submission. It is the Crown's position that the trial judge was correct in ruling the licence to be irrelevant.

3. The terms of the licence

[para38] On January 9th 1991 licence numbered N5L4-0087 was issued to the Town of Iqaluit by the Northwest Territories Water Board pursuant to the *Northern Inland Waters Act* and the *Northern Inland Waters Regulations*, C.R.C. 1978, c. 1234, enacted under that *Act*. The licence, except for the conditions thereto attached (to which I shall refer below) reads as follows:

> NORTHWEST TERRITORIES WATER BOARD
>
> Pursuant to the *Northern Inland Waters Act* and Regulations the Northwest Territories Water Board, hereinafter referred to as the Board, hereby grants to
>
> TOWN OF IQALUIT (Licensee)
>
> of IQALUIT, NORTHWEST TERRITORIES (Mailing address)
>
> hereinafter called the Licensee, the right to alter, divert or otherwise use water subject to the restrictions and conditions contained in the *Northern Inland Waters Act* and Regulations made thereunder and subject to and in accordance with the conditions specified in this licence:

Licence Number	N5L4-0087 (RENEWAL)
Water Management Area	NORTHWEST TERRITORIES 05
Location	IQALUIT, NORTHWEST TERRITORIES
Purpose	TO USE WATER FOR MUNICIPAL PURPOSES AND DISPOSE OF MUNICIPAL WASTES
Quantity of Water Not to be Exceeded	800,000 CUBIC METRES PER YEAR
Rate of Use of Water Not to be Exceeded	800,000 CUBIC METRES PER YEAR
Effective Date of Licence	JANUARY 1, 1991
Expiry Date of Licence	DECEMBER 31, 1995

> This Licence issued and recorded at Yellowknife includes and is subject to the annexed conditions.
>
> Northwest Territories Water Board
>
> (Signed)
> "PAMELA R. LeMOUEL"
> Witness
>
> (Signed)
> "DAVE NICKERSON"
> Chairman
> Approved by

(Signed)
"TOM SIDDON"
Minister of Indian Affairs and Northern Development

[para39] The conditions attached to the licence include the following:

GENERAL CONDITIONS

PART A

1. Scope

This Licence allows for water use and waste disposal for municipal purposes at the Town of Iqaluit, Northwest Territories.

2. Definitions

In this Licence: N5L4-0087

"*Act*" means the *Northern Inland Waters Act*;

"Regulations" means Regulations proclaimed pursuant to Section 29 of the *Northern Inland Waters Act;*

"Board" means the Northwest Territories Water Board established under Section 8(1) of the *Northern Inland Waters Act;*

"Licensee" means the holder of this Licence:

"waste" means waste as defined by Section 2(1) of the *Northern Inland Waters Act:*

"Sewage" means all toilet wastes, greywater and commercial wastewater.

4 This Licence is issued subject to the conditions contained herein with respect to the taking of water and the depositing of waste of any type in any waters or in any place under any conditions where such waste or any other waste that results from the deposit of such waste may enter any waters. Whenever new Regulations are made or existing Regulations are amended by the Governor in Council under the *Northern Inland Waters Act*, or other statute imposing more stringent conditions relating to the quantity or type of waste that may be so deposited or under which any such waste may be so deposited this Licence shall be deemed, upon promulgation of such Regulations, to be automatically amended to conform with such Regulations.

11. Compliance with the terms and conditions of this Licence does not absolve the Licensee from responsibility for compliance with the requirements of other Federal and Territorial legislation.

CONDITIONS APPLYING TO WASTE DISPOSAL

PART C

1. The Licensee shall discharge all piped and pumpout sewage waste using the facilities as identified in Drawing No. 86-5175-TR1 entitled "Municipality of Iqaluit Sewage and Water System - Overall Plan" dated March 1987, or as otherwise approved by the Board in accordance with Part D of this Licence.

2. All waste discharged from the facilities as identified in Part C, Item 1, shall meet the following effluent quality standards during open water periods:

PARAMETER MAXIMUM AVERAGE CONCENTRATION

BOD[subscript 5] 180 mg/L Suspended Solids 120 mg/L Fecal Coliform 2.0 x 10[superscript 5] CFU/dL

The pH shall be above 6 and there shall be no visible sheen of oil and grease.

[para40] The term "waste", to which Part A, Item 2 of the General Conditions of the Licence refers, is defined by s.2(1) of the *Northern Inland Waters Act* as follows:

2.(1) In this *Act*

"waste" means

(a) any substance that, if added to any water, would degrade or alter or form part of a process of degradation or alteration of the quality of that water to an extent that is detrimental to its use by man or by any animal, fish or plant that is useful to man, and

(b) any water that contains a substance in such a quantity of concentration, or that has been so treated, processed or changed, by heat or other means, from a natural state that it would, if added to any other water, degrade or alter or form part of a process of degradation or alteration of the quality of that water to the extent described in paragraph (a),

and without limiting the generality of the foregoing, includes anything that, for the purposes of the *Canada Water Act* is deemed to be waste.

4. The scope of the licence

[para41] Licences such as that now under consideration derive their legal effect only from the statute under which they are issued; and their scope is restricted to the legislative scope of the statute. This licence was issued pursuant to s.11 of the *Northern Inland Waters Act*. As appears from s.11, such a licence authorizes the licensee "to use waters, in association with the operation of a particular undertaking described in the licence", and no other waters. The term "waters" is defined by s.2(1) of the *Act*, as follows:

> 2.(1) In this *Act*
>
> "waters" means waters in any river, stream, lake or other body of inland water on the surface or underground in the Yukon Territory and the Northwest Territories.

[para42] As appears on the face of the licence, the licensee's right to use water thereunder is subject to the restrictions and conditions contained in the *Northern Inland Waters Act*. Section 7 of the *Act* provides:

> 7. (1) Except in accordance with the conditions of a licence or as authorized by the regulations, no person shall deposit or permit the deposit of waste of any type in any waters or in any place under any conditions where the waste or any other waste that results from the deposit of the waste may enter any waters.
>
> (2) Subsection (1) does not apply to the deposit of waste in waters that form part of a water quality management area designated pursuant to the *Canada Water Act* if the waste so deposited is of a type and quantity and is deposited under conditions authorized by regulations made by the Governor in Council under paragraph 18(2)(a) of that *Act* with respect to that water quality management area.

[para43] Bearing in mind the restrictive definition of "waters" in s.2 of the *Act*, and the use of that term in s.7 (and elsewhere) in the *Act*, it is readily apparent that this term refers only to inland waters as opposed to waters of the sea, whether "internal waters" or "territorial sea" waters as defined by s.3 of the *Territorial Sea and Fishing Zones Act*, R.S.C. 1985, c. T-8. And, as already noticed, the expression "water frequented by fish" is defined by s.34(1) of the *Fisheries Act* to mean "Canadian fisheries waters", which is in turn defined by s.2 of that *Act* to mean waters in the "territorial sea", "internal waters" and "waters in the fishing zones" of Canada. No mention is there made of "inland waters".

[para44] The licence issued to the Town of Iqaluit in this instance therefore could not in law, and so did not, authorize the Town (or anyone on its behalf) to use waters other than as defined by the Northern Inland Waters Act; and, more particularly, it did not authorize the use of "internal waters" on the sea coast included in "Canadian fisheries waters" by the definition in s.2 of the *Fisheries Act*.

[para45] Quite apart from that, it is furthermore all too clearly apparent from Part A, Items 4 and 11 of the General Conditions of the licence that nothing stated or intended in it absolves the licensee, or anyone acting on its behalf, from responsibility for due compliance with the requirements of the *Fisheries Act*. Even if the effluent quality standards described in the

Conditions Applying to Waste Disposal, Part C, Item 2 of the licence are to be understood as applying only "during open water periods", nothing in the licence authorized the Commissioner (or anyone acting for or under him) to deposit any deleterious substance, or permit such deposit, in violation of s.36(3) of the *Fisheries Act.*

5. Conclusion

[para46] It is therefore not necessary to consider the basis upon which the trial judge ruled that the licence was irrelevant. The licence provides no defence in law to the charge that there was a violation of s.36(3) of the *Fisheries Act.*

[para47] Nor is it necessary to consider whether, and to what effect, the Commissioner was acting on behalf of the Town of Iqaluit so as to be able to claim that he was covered by the licence. And since the licence is inapplicable to the matter at hand, there is no need to consider whether the Commissioner (or anyone acting under him) was misled into an officially induced error by reason of the licence.

[para48] Finally, it is not necessary to consider the statutory interpretation arguments advanced by counsel for the Commissioner with reference to any conflict between the *Northern Inland Waters Act* and the *Fisheries Act.* I see no conflict between these statutes, each of which applies within its own domain. The conditions of the licence make it clear, in any event, that the *Fisheries Act* is paramount so far as the licence is concerned, if indeed these statutes should overlap or give rise to any conflict. That being so, there is no basis upon which the Commissioner can invoke s.36(4) of the latter *Act* to justify the offence charged, even if the licence could have the status of "regulations" under s.36(4), which is not the case, on the evidence.

V. The " actus reus"

1. Strict Liability

[para49] In her submissions on behalf of the Commissioner with respect to the unconstitutional vagueness argument, counsel took the position that the offence of which the Commissioner has been convicted is one for which a term of imprisonment may be imposed. I have proceeded on that basis in considering the argument although I notice that s.40(2) of the *Fisheries Act* does not provide for the imposition of a term of imprisonment, even on default of payment of a fine, for a first offence. The conviction under appeal is for a first offence only. Subsection 40(2) of the *Act* states;

> 40. (2) Every person who contravenes subsection 36(1) or (3) is guilty of
>
> (a) an offence punishable on summary conviction and liable, for a first offence, to a fine notexceeding three hundred thousand dollars and, for any subsequent offence, to a fine not exceeding three hundred thousand dollars or to imprisonment for a term not exceeding six months, or to both; or

> (b) an indictable offence and liable, for a first offence, to a fine not exceeding one million dollars and, for any subsequent offence, to a fine not exceeding one million dollars or to imprisonment for a term not exceeding three years, or to both.

[para50] Counsel's position is, for all that, nevertheless correct in my view since the provisions of s.36(3) of the *Fisheries Act* must be read in the same way and subject to the same requirements of constitutionality and general law whether the offence is, or is not, a first offence. I have therefore proceeded on that basis not only in reference to the constitutional question but also in what follows.

[para51] It is common ground between the parties, in any event, that the offence in this case must be regarded as one of strict liability pursuant to the criteria recognized in *R.* v. *Sault Ste Marie*, [1978] 2 S.C.R. 1299, 40 C.C.C. (2d) 353, 3 C.R. (3d) 30, 85 D.L.R. (3d) 161, 7 C.E.L.R. 53, 21 N.R. 295. That is the basis on which s.36(3) and s.40(2)(a) of the *Fisheries Act* are discussed here.

[para52] As in the prosecution of any offence of strict liability, it was not necessary for the Crown to go further than establishing in evidence, beyond a reasonable doubt, each of the essential elements of the offence known as the actus reus, in order to obtain a conviction; there was no obligation on the Crown to also show that the Commissioner acted with mens rea or "guilty knowledge".

2. Alleged Errors

[para53] On behalf of the Commissioner it is submitted that the trial judge erred in finding that the Crown had established in evidence, beyond a reasonable doubt, that the Commissioner (1) "permitted the deposit" of a substance that was (2) "deleterious" in (3) "water frequented by fish, to wit: Koojesse Inlet".

(a) "permitted the deposit"

[para54] The term "deposit", as it is defined by s.34(1) of the *Fisheries Act*, is to be understood within the context of s.40(5)(a) for the purposes of s.36(3) of the *Act*. Paragraph 40(5)(a) states:

> 40. (5) For the purposes of any proceedings under subsection (2) or (3), (a) a "deposit" as defined in subsection 34(1) takes place whether or not any act or omission resulting in the deposit is intentional.

[para55] In *R.* v. *Sault Ste Marie*, Dickson J. (as he then was) made the following statement:

> It may be helpful ... to consider in a general way the principles to be applied in determining whether a person or municipality has committed the actus reus of discharging, causing, or permitting pollution within the terms of s.32(1), in particular in connection with pollution from garbage disposal. The prohibited act would, in my opinion, be committed by those who undertake the collection and disposal of garbage, who are in a position to exercise continued control of this activity and prevent the pollution from occurring, but fail to do so.

> ... The "permitting" aspect of the offence centres on the defendant's lack of interference or, in other words, its failure to prevent an occurrence which it ought to have foreseen.

[para56] The offence in that case was created by s.32(1) of the *Ontario Water Resources Act*, R.S.O. 1970, c.332, an enactment in many important respects analogous to s.36(3) of the *Fisheries Act*. The principles governing the interpretation and application of the Ontario provision are equally applicable to the interpretation and application of s.36(3) of the latter *Act*. These principles are fully consistent with para. 40(5)(a) of that *Act*. Lack of action to prevent the deposit of a deleterious substance into water frequented by fish, a deposit which ought to have been foreseen and which could have been prevented by the exercise of due diligence, therefore violates s.36(3).

[para57] The trial judge cited the relevant principles which had been laid down in *R.* v. *Sault Ste Marie*, in his reasons for judgment on the issue of guilt delivered on August 27th 1993. And while he did not quote the entire passage from that case which I have set out above, he did quote the essential portion of it. It is plain that he had the relevant principles in mind. And although he did not quote the following passage from that case, it is equally plain that he applied it in a complete and thoroughgoing manner:

> The test is a factual one, based on an assessment of the defendant's position with respect to the activity which it undertakes and which causes pollution. If it can and should control the activity at the point where pollution occurs, then it is responsible for the pollution. Whether it "discharges", "causes", or "permits" the pollution will be a question of degree, depending on whether it is actively involved at the point where the pollution occurs, or whether it merely passively fails to prevent the pollution.

[para58] This was the nature of the test applied by the trial judge to the evidence before him. It was the proper test to be applied. The question now posed to this Court is whether that test was however properly applied.

[para59] First of all, did the Commissioner have control over the Iqaluit sewage lagoon? At trial, both ownership and control over the lagoon by the Commissioner was admitted as a fact by counsel on his behalf. It is immaterial whether the Commissioner's ownership and control was as principal or as agent, or partly one and partly the other. On the basis of the admission, the trial judge could and did find that the Commissioner in fact controlled the lagoon at the time of the offence charged, and had done so for some years before.

[para60] Secondly, did the Commissioner control or should the Commissioner have controlled the lagoon's seaward dyke so as to prevent any overflow or, as events proved, a bursting of the dyke with the lagoon's contents being discharged beyond the dyke? This question, in turn, leads to the further question: whether the overflow and bursting of the dyke, with its consequences, were outside the control of the Commissioner. If there was only a reasonable doubt on that point, the Commissioner was entitled to an acquittal on the ground that the Crown had failed to prove each element of the actus reus of the offence charged.

[para61] That was the basis on which a majority of the British Columbia Court of Appeal upheld the acquittal in *R.* v. *Rivtow Straits Ltd.* (1994), 12 C.E.L.R. (N.S.) 153, affirming (1992), 8 C.E.L.R. (N.S.) 16 (B.C.S.C.).

[para62] The trial judge, on the evidence, did not find any reasonable doubt on the point. He rejected the Commissioner's submissions that the overflow and rupture of the dyke were caused either by modifications made by another federal department or agency to the slopes and drainage above the lagoon or by an Act of God in the form of exceptionally warm weather leading to an unusually sudden and heavy flood of water down those slopes, none of which (it was submitted on behalf of the Commissioner), was foreseeable or within the Commissioner's control.

[para63] Having reviewed the evidence, I hold that it was reasonably capable of supporting the trial judge's conclusion that the Commissioner in fact did passively permit what ultimately occurred when the dyke of the lagoon gave way, since the Commissioner was responsible for its control and was aware of the risk from an earlier instance of dyke failure in 1987.

(b) "deleterious"

[para64] It is submitted on behalf of the Commissioner that the trial judge failed to apply "the test" for what is "deleterious" as formulated in the Northwest Falling Contractors Ltd. case. Furthermore, counsel for the Commissioner reminds the Court: "Not one dead fish was ever reported as a result of the failure of the sewage lagoon".

[para65] Reliance is also placed on *R.* v. *Cominco Ltd. - Cominco Ltee.* (1993), 11 C.E.L.R. (N.S.) 61 (B.C.Prov.Ct.), by counsel for the Commissioner, for the proposition that there was no evidence before the trial judge as to the element of deleteriousness of the deposit since no test samples were taken at the time of the spill or soon thereafter.

[para66] I am unpersuaded by these submissions that the trial judge erred in finding, as he did, that the contents of the sewage lagoon had been shown, on the evidence before him, to be beyond a reasonable doubt "deleterious" within the meaning of s.36(3) and s.34(1) of the *Fisheries Act*. Once again, a review of the evidence reveals that it was reasonably capable of supporting the trial judge's factual finding on this point.

(c) "water frequented by fish, to wit: Koojesse Inlet"

[para67] The evidence that a significant spillage of the contents of the sewage lagoon flowed downslope across the ice still present (early in June 1991, at Iqaluit on Baffin Island) after the dyke burst, is of course only circumstantial. Those contents, according to the evidence, consisted of 56,000 cubic meters of untreated sewage. This can be restated, for ease of comprehension, as 12 million gallons of untreated sewage.

[para68] There is not a shred of evidence to cast the slightest shadow of doubt on the conclusion reached by the trial judge that some, if not all, of the lagoon's contents reached and entered the waters of the sea lapping the shore of Koojesse Inlet at a distance of about one or two hundred meters below the lagoon. That was the only reasonable conclusion to be reached on the evidence.

[para69] The Court House at Iqaluit is located within a similar short distance from the waters (and, of course, seasonal ice) of Koojesse Inlet. The very name "Iqaluit" is well known in that part of the Northwest Territories to connote fishing. These are tidal waters, as the evidence mentions, forming an arm of the sea. It is a notorious fact that seagoing vessels, on which the population of Iqaluit relies for many supplies and provisions brought there regularly by "sealift", are to be seen anchored in Koojesse Inlet when the ice permits (usually within a relatively short time after the period when the lagoon spilled its contents in 1991).

[para70] No attempt was made, quite understandably, on behalf of the Commissioner, to advance any proof pursuant to s.40(5)(b) of the *Fisheries Act*, which states:

> 40. (5) For the purposes of any proceedings under subsection (2) or (3),
>
> (b) no water is "water frequented by fish" as defined in subsection 34(1), where proof is made that at all times material to the proceedings the water is not, has not been and is not likely to be frequented in fact by fish.

[para71] This element of the actus reus of the offence charged was also established, on the evidence before the Court and to the satisfaction of the trial judge, beyond a reasonable doubt.

3. Conclusion

[para72] In reviewing the evidence I have borne in mind the principles enunciated by the Supreme Court of Canada in *R.* v. *Yebes*, [1987] 2 S.C.R. 168, [1987] 6 W.W.R. 97, 36 C.C.C. (3d) 417, 59 C.R. (3d) 108, 43 D.L.R. (4th) 424, 17 B.C.L.R. (2d) 1, 78 N.R. 351, and reaffirmed in *R.* v. *Burns* (1994), 165 N.R. 374 (S.C.C.).

[para73] Having reviewed the evidence as a whole, with particular attention to the submissions made on behalf of the Commissioner, I find no merit in the submission that the actus reus of the offence charged was not established, as to each element, beyond a reasonable doubt; and there is furthermore no merit in the submissions made on behalf of the Commissioner to the effect that the trial judge's factual findings in respect of the actus reus, or any of them, were unreasonable except as follows.

VI. Events of June 1st 1991

[para74] I accept the submission made on behalf of the Commissioner that the evidence before the trial judge cannot support the factual finding that the unlawful deposit of sewage took place on June 1st rather than June 2nd 1994. The conviction under appeal must therefore be amended accordingly.

VII. Defence of Necessity

[para75] The Commissioner having permitted the sewage lagoon to overflow and burst its dyke so that the dyke required immediate repair; and having taken no measures whatever to prevent that from occurring or to be in a position to make adequate repairs in an emergency; the defence of

necessity is not available in answer to the charge, particularly for the period of June 3rd to 10th 1991 (both dates inclusive). The trial judge did not err by omitting even to mention that defence, given the evidence before him.

[para76] The relevant law is discussed in *Perka* v. *The Queen*, [1984] 2 S.C.R. 232, 14 C.C.C. (2d) 385, 42 C.R. (3d) 113, [1984] 6 W.W.R. 289, 13 D.L.R. (4th) 1, 55 N.R. 1, in which it was held (per Dickson J. for the majority) that:

> If the accused's "fault" consists of actions whose clear consequences were in the situation that actually ensued, then he was not "really" confronted with an emergency which compelled him to commit the unlawful act he now seeks to have excused. In such situations the defence is not available.

[para77] The most that can be said for the actions taken during the period June 3rd to 10th 1991 (both inclusive) is that they may be considered in mitigation of sentence, in so far as those actions were taken by or on behalf of the Commissioner.

VIII. Extra-curial Evidence

[para78] No substantial wrong or miscarriage of justice arose from the references made by the trial judge to the publication Health of Our Oceans, published in March 1991 by the Marine Environment Quality Group, Conservation and Protection Branch, Department of Environment of Canada. There was ample evidence, quite apart from anything in that publication, to sustain the factual findings made by the trial judge as to the deleterious nature of the contents of the lagoon deposited in the waters of Koojesse Inlet.

[para79] In my respectful view, the verdict of the trial judge could have been no different had he made no reference to this publication.

IX. The Application to Re-open

1. The trial judge's exercise of discretion

[para80] It is well established that a trial judge may, in the exercise of a proper judicial discretion, either allow or disallow a party to re-open that party's case before judgment: *Scott* v. *The Queen* (1990), 61 C.C.C. (3d) 300, 2 C.R. (4th) 153, 43 O.A.C. 277, 116 N.R. 361 (S.C.C.); *R.* v. *Hayward* (1994), 86 C.C.C. (3d) 193 (Ont. C.A.). And an appellate court will not interfere unless it is shown that the trial judge failed to exercise that discretion judicially: *R.* v. *Lessard (1976)*, 30 C.C.C. (2d) 70, 33 C.R.N.S. 16 (Ont. C.A.).

[para81] The trial judge heard the application to re-open the Commissioner's case at some length, from both the Commissioner's and the Crown's side. He then delivered his decision to reject the application, together with his extensive oral reasons for that decision, all of which is in the trial record. It is unnecessary to repeat those reasons here. It is enough that they show his thorough grasp and painstaking consideration of the submissions made on behalf of the Commissioner and

that he found them nevertheless to be wanting. He exercised his discretion judicially. That ends the matter.

2. The estoppel argument

[para82] No authority has been offered on behalf of the Commissioner in support of the submission that the Crown in right of Canada was estopped from challenging or disputing the validity of data published officially by an agency or department of the Crown in right of Canada. It is always open, in my respectful view, to the Crown in its prosecutorial aspect to challenge or dispute any such data if it is in the interests of justice to do so in the course of a prosecution. Nor, I should think, would the Crown as a defendant be estopped from doing so, in the interests of justice, in the course of a prosecution.

3. Crown disclosure

[para83] It is argued that the Crown failed to disclose in advance the evidence which it led in rebuttal of the Commissioner's defence evidence. This alleged failure was argued on behalf of the Commissioner as an alternative basis for his application to re-open his case. However, that basis or ground for the application was abandoned by counsel for the Commissioner, since it would have required the filing of affidavit material and could have led to complications for the Commissioner's counsel in representing his client. More-over, no objection was taken, at the time, to the evidence led by the Crown in rebuttal, on the ground of non-disclosure; even though cross examination of the Commissioner's witness for the defence should by then have alerted the Commissioner's counsel that the Crown was aware of frailties in that witness's testimony, which frailties were made apparent by undisclosed information. It is too late now to raise the non-disclosure, on this appeal, in these circumstances.

X. Disposition

[para84] The appeal against conviction is dismissed subject to the conviction being amended to exclude reference to June 1st 1991.

[para85] The appeals against sentence shall now be heard. Costs may be spoken to at that time also.

ALBERTA COURT OF QUEEN'S BENCH

[Indexed as: *R.* v. *Jackson*]

Between Her Majesty the Queen, Crown/Respondent, and Richard Jackson, Accused/Appellant

Wilson J.

Edmonton, September 15, 1994

***Fisheries Act*, R.S.C. 1985, c. F-14, s. 35 – interpretation of "harmful" – modifies "alteration"**

Defences – de minimus – application of defence should not be calculated as a comparison of the work to the entire body of water

Summary: This is an appeal by the accused of a charge under the *Fisheries Act*. The learned justice responded to three arguments by the appellant. The first argument concerned whether there was evidence of dependence by fish on the water for life processes. The court found that evidence in the agreed statement of facts to the effect that the channel dredged by the accused was the site of northern pike spawning habitat was also evidence of the "life processes" aspect of the definition of fish habitat in the Act.

The second issue was whether there was sufficient evidence before the trial judge to find that there was damage to fish habitat. The court found that the trial judge found damage as a matter of fact and there was no reason to interfere with the finding. The learned justice stated in obiter that the word "harmful" arguably modifies "alteration" only; not the words "disruption" and "destruction" in s. 35 of the *Fisheries Act.*

The third issue raised the question of whether the accused could rely on the defence of *de minimis non curat lex* because of the insignificant nature of the channel dredging in comparison to the vast area of the lake and shoreline. The court rejected the defence, stating that the dredging operation was significant. The *de minimus* defence should not be calculated by a comparison of the work to the total body of water.

Held: Appeal dismissed.

REASONS/MOTIF:

Wesley W. Smart, Counsel for the Crown
Tom Plupek, Counsel for the Accused

[para1] WILSON J.:-- I have concluded that this appeal should be dismissed.

[para2] Mr. Plupek argued before me that there was no evidence that the work had damaged "fish habitat" as that expression is defined in the *Fisheries Act*, R.S.C., 1985, c F- 14. He argues

that there was no evidence that the "fish depend directly or indirectly (on the area) in order to carry out their life processes". That is the wording in the definition clause.

[para3] I do not agree. There is such evidence. It is found in the agreed statement of fact, paragraph 19, which reads as follows:

> "Based on the witness report prepared by Dave Walty, Exhibit 11, it is agreed that the channel was dredged through fish habitat, for purposes of Section 35 of the *Fisheries Act*. The channel dredged by Richard Jackson was the site of northern pike spawning habitat."

[para4] This is an admission that all the necessary parts of the definition of "fish habitat" were proven. By this admission the "life processes" aspect of the definition was admitted.

[para5] I do not necessarily agree with the learned trial Judge that the word "harmful" modifies the words "disruption" and "destruction" in Section 35 of the *Fisheries Act*. Arguably, it only modifies "alteration", and that view of the meaning of the section seems to be born out by the discussion in *R.* v *Fillion* ([1993) AQ No 1810, Quebec C.A.), where the French version of the section is considered and compared to the English. This however is not critical to the decision under appeal. The learned trial Judge found that "harmful" meant, inter alia, "damage", and that there was evidence that supported a finding that the habitat had been damaged by the alteration. It is not necessary to a conviction that there be a finding that any fish has been harmed or altered. The Trial Judge found this as a fact on sufficient evidence. The Appellant agreed that this was a finding of fact. There is no basis to interfere with it. This Court should not interfere with that finding unless there was no evidence upon which the impugned finding could be made, or unless there is palpable or over-riding error. There is no such error demonstrated.

[para6] In my opinion the defence of *de minimis non curat lex* is not available to assist the Appellant. Granted, the Trial Judge found that the work was insignificant when compared to the vast area of the lake and shoreline itself. That, I think, is not the test. The photo exhibits indicate that this was a major channel dredging, a substantial piece of work. In my view, a *de minimis* defence would only be available if the work was in the nature of a shovel full or two of digging, or something in the nature of clam or mussel digging on the foreshore on a casual basis. It would not cover an operation such as that described here. It should not be calculated by a comparison of an area of work compared to area of total lake or body of water. I reject that defence in the circumstances that exist here.

ALBERTA PROVINCIAL COURT CRIMINAL DIVISION

[Indexed as: *R.* v. *Suncor*]

Between Her Majesty the Queen v. Suncor Inc.

Mustard, Prov. Ct. J.

Edmonton, October 26, 1994

***Fisheries Act*, R.S.A. 1985, c. F-14, ss 35(1), 79.2 – guilty plea to charge under s. 35(1) – sentencing hearing – spill from pipeline – not worst case scenario**

Sentencing – total penalty $100,000 – fine of $25,000 – order under s. 79.2 of the *Fisheries Act* of $75,000 – general and specific deterrence are most important factors in environmental sentencing – each sentence must be decided on its own facts

Summary: The accused company, Suncor, pleaded guilty to charges under s. 35(1) of the *Fisheries Act* of unlawfully carrying on a work or undertaking, being an oil pipeline, that resulted in the harmful alteration or disruption of fish habitat in the House River. This is a hearing on sentencing.

The pipeline spill resulted from 2 factors: (1) lack of knowledge on the part of the operator and the absence of a work standard for checking for closed valves, and (2) a pipe failure as part of a fatigue crack. Approximately 7600 bbls. of diesel-naphtha was spilled, of which 2100 bbls. reached the river. Half of that was recovered. Mortality of fish and the benthic community was substantial, but the benthic communities and possibly the fish populations would have returned to pre-spill levels in 30-90 days.

The learned judge determined that sentencing in each case must be decided on its own facts, using general principles from previous cases as a guide. This was not a worst case situation respecting the environmental destruction, resulting mainly from the rapid and effective response from the accused corporation. Imposition of a sentence required balancing the substantial spill and resulting damage against the factors reflecting good corporate citizenship, including the company's extensive efforts to comply with the law, its remorse as demonstrated by its guilty plea, the presence of a corporate executive at the hearing, its follow up inspection activities and its good record respecting pipeline operations. The court concluded that the offence falls in the top of the lower third of the continuum and should attract a proportionate sentence.

Held: A total penalty of $100,000 was imposed, including a fine of $25,000 and $75,000 to be subject of an Order under s. 79.2 of the *Fisheries Act*, to be agreed on by the parties and approved by the court.

REASONS/MOTIF:

Dennis R. Thomas, Q.C., Counsel for the Defendant

Wesley W. Smart, Counsel for Her Majesty the Queen

SENTENCING

[para1] MUSTARD PROV. CT. J.:-- On October 11, 1994, the accused Corporation pled guilty to an offence under s. 35(1) of the *Fisheries Act* that it did;

> "between the 19th day of June, AD., 1992 and the 27th day of June, AD., 1992, near the City of Fort McMurray, in the Province of Alberta ... unlawfully carry on a work or undertaking, to wit: the oil pipeline between Tea Island and Edmonton, that resulted in the harmful alteration or disruption of fish habitat, to wit: the House river... "

[para2] After submissions and argument the matter was adjourned to this date for sentencing.

[para3] The Agreed Statement of Facts, Exhibit 1 in the sentencing, is incorporated by reference and will only be repeated here as necessary.

[para4] Pollution is a crime and punishable as such. Sentencing involves a review of what the Courts have delineated as the relevant areas for consideration and then the balancing of the aggravating and the mitigating factors related to them. General and specific deterrence are probably the most significant elements in environmental sentencing.

THE FACTORS:

a. Nature of the Environment

[para5] The House River is a typical northern boreal river. The point on the river where the spill occurred was relatively inaccessible, in the lower reaches of the river, well below the more sensitive spawning areas. While the aquatic environment as it respects fish is relatively fragile, on the facts before us, it recovered quickly with minimal long term effect.

b. The Extent of the Damage

[para6] In the order of pipeline spills recorded in Alberta, the quantity of the diesel-naphtha spill was substantial, - 7600 bbls. of which 2100 reached the river, and about half of that was recovered. The mortality of the fish and the benthic community was substantial but on the evidence

> "the benthic communities (eg. bacteria, algae, macrobenthos) and perhaps fish populations would have returned to pro-spill levels within 30 to 90 days."

[para7] It was not a case of "destruction" of the habitat as originally alleged and subsequently amended and acknowledged by the Crown, rather it's "alteration and disruption."

c. The Criminality of the Offence

[para8] Exhibit S3 indicates there were two primary causes for the spill,

> (a) a lack of knowledge by the operator and the absence of a work standard requiring the log to disclose and be checked for closed valves, with the result that the pumps were operated against a closed valve; and
>
> (b) pipe failure as a result of a fatigue crack at the edge of a weld attaching a hot-tap to the line in 1974 as part of a leak isolation and repair procedure carried out at that time.

[para9] It was the unique combination of these factors that caused the spill. The Corporation has since modified its faulty work standard, and prior to the spill had a more comprehensive training and operations manual in the course of development. None of this was wilful or conscious, but the guilty plea acknowledges that the defence of due diligence is not available.

[para10] A sophisticated computer operated monitoring system, including pressure alarms, was in position and operating, and exceeded ERCB requirements. As a result of human error they didn't prevent the break. The maintenance, inspection and repair programs of the Corporation relative to the Pipeline met and in some ways exceeded ERCB requirements. These involved an annual cost of $13 million prior to the spill and were subsequently accelerated to $1.9 million annually. In my opinion the submissions of the Crown on the degree of culpability of Suncor go well beyond what is justified by the evidence before the Court.

d. The Extent of Suncor's Attempts to Comply with the Law

[para11] The evidence shows no failure on their part to comply with applicable regulatory requirements relative to the maintenance and operation of the pipeline. Once the spill was identified the response of Suncor was immediate, substantial, effective and very expensive. Within six hours, mostly in darkness, in a relatively inaccessible area, they had a dike in place to prevent further product from entering the river. The clean-up conducted by the Corporation was efficient and successful, involving an expenditure of more than $2.2 million, in addition to the cost of the accelerate maintenance and inspection program. Suncor promptly reported the spill to both regulatory bodies and co-operated with them throughout.

e. Remorse

[para12] The accelerated inspection program resulted in line cut-outs well in excess of ERCB requirements. Suncor has upgraded the software for the computer facilities already referred to. A senior executive was present at the sentencing hearing as evidence of corporate remorse.

[para13] The most significant remorse factor is the guilty plea. Based on the known costs to both Crown and defence in other environmental prosecutions the saving to the taxpayer of a timely plea is enormous and constitutes an important mitigating factor. No illegal gain or profit accrued to Suncor as a result of it's failure to repair the anomaly at the site of the break, of which it had notice in October 1991. That in my opinion, is not, as the Crown alleges, a case of the Corporation "taking a calculated risk" in not the making that repair at that time. Hindsight has 20-20 vision.

f. Size, Wealth etc. of Suncor

[para14] Suncor is a very large fully integrated oil and gas company. It differs from many of its competitors in that in addition to its conventional crude oil sources it has it's huge Oil Sands operations as well as the pipeline to carry that production to Edmonton for final refining.

[para15] The Oil Sands Group, of which the Pipeline is a part, forms a large element of the total corporate operations and has been consistently profitable over the past five years, with the exception of a large loss in 1992 - not, I might add, due to the pipeline spill. The Oil Sands operations and the related pipeline have been in operation since the mid-sixties and in 1993 employed 1715 people. The break and spill in question is the first involving the pipeline since 1974, and that was caused by a landslide.

g. Criminal Record

[para16] Suncor has no record of any convictions in relation to the operations of the pipeline. However, in relation to the operations of the Oil Sands Plant there are the following convictions:

a. Conviction after trial in 1985 on two counts of offences under the *Fisheries Act* related to an explosion and fire at the Plant in 1982 resulting in the release of substances into the Athabasca River. It received two $15,000. fines; and

b. In 1990 Suncor pled guilty to four counts of failing over a period of four days to comply with the conditions of a license under the *Clean Air Act* on the occasion of a plant start-up following a shut-down for routine maintenance. Two $15,000. and two $20,000. fines were assessed.

[para17] There is no evidence before the Court as to the seriousness or the extent of those offences. The convictions relate to the Plant and not the Pipeline, nonetheless they must be considered somewhat related. While they are aggravating factors, their effect should be tempered by the reality that in any operation as massive and complicated as those at the Suncor Plant near Ft. McMurray, there are bound to be accidents. That there haven't been more incidents over that span of time speaks well for the care with which the corporation carries on its operations.

h. Penalty

[para18] From the evidence it would appear that Suncor has sophisticated equipment and computer programs to monitor the pipeline operations and warn of problems. Unfortunately the systems for leak detection were less effective during start- up, which was the situation here, something that has since been modified and improved by Suncor. What occurred here were two factors acting together that reflect something less than due diligence. The result was unfortunate and substantial, but thanks in large part to the rapid and effective response of the Corporation, the damage was transient, not long term.

[para19] For that and the other reasons already stated, and on the evidence I am unable to categorize this as a "worst case" of environmental destruction (or even a worst case "alteration or disruption," to quote the wording of the Information). Once the aggravating and mitigating factors are considered, this case falls far below a "worst case" situation for which a maximum or a very high fine is appropriate.

[para20] The cases cited by both parties cover the spectrum from the most aggravated to minimal in terms of culpability, corporate attitude, response, clean-up, duration, volume and toxicity, damage and potential for damage, and sensitivity of the environment affected, not to mention the wide variety of fines imposed and the applicable maximums against which they may be compared. For this reason the usefulness of the cases as precedents to be followed in setting the penalty in this case is very limited. In this respect the words of Ayotte, Terr. Ct. J. in *R.* v. *Echo Bay Mines Ltd* 1980 3 F.P.R. 47. are particularly apt:

> "I should also say that I have been mindful of the sentences imposed in the other cases cited to me. Both counsel urged one or the other of them upon me as seemed in their view appropriate. With the greatest respect to those who feel otherwise, I feel that any attempt to quantify a sentence or extract some tariff of sentencing from decided cases to be a futile exercise and therefore have relied on the cases cited more to provide general guidelines than for help in fixing the precise amount of the fine imposed. Each sentence must be decided on its own facts and I have tried to apply that principle here."

and apply equally here. For that reason I do not intend to attempt to distinguish or compare them to the present case. All cases cited by counsel are listed in the attached schedule "A" and have been read and considered. In my opinion the closest in point of fact and applicable factors is *R.* v. *Shell Canada Products Ltd.* 1992 unreported Burnaby, B.C. B.C. Prov. Court. Shell is an even larger fully integrated oil company, the same type of product escaped, the environment was similar to what it was in this offence, each was a good corporate citizen, each responded quickly and effectively, each was unable to show due diligence and both had short related records. On balance, I feel the present case more serious, based on the damage and the quantity spilled.

[para21] In my opinion to arrive at the appropriate penalty one must balance the factors already stated, weight their relative importance and try to arrive at a penalty that fits the crime. In doing so one must neither make light of the substantial environmental spill and resulting damage nor impose a penalty for those aspects of the total situation already stated that reflect good corporate citizenship. The penalty must at the same time deter both Suncor and others from any want of care giving rise to like incidents.

[para22] Taking all the factors and their related aggravating and mitigating circumstances into consideration, it is my opinion that this offence falls in the top of the lower third of the continuum from "de minimus" to "worst case" and should therefore attract a penalty proportionate to that assessment. I therefore find $100,000.00 to be appropriate in the circumstances. This Court therefore imposes a fine of $25,000.00 and the balance of $75,000.00 shall be the subject of an Order under s. 79.2 of the *Fisheries Act* to be agreed upon between the parties and approved by this Court.

MUSTARD PROV. CT. J.

* * * * *

SCHEDULE "A"

[para23] AUTHORITIES

1. *Fisheries Act* R.S.C. 1985 c. F-14, s. 41(1)
2. Le Chene No 1 (1987), 4 F.P.R. 67, 70 (NWT.T.C.)
3. *Canada Tungsten Mining Corporation* v. *R*.. (unreported) March 5, 1976 (NWT.S.C.)
4. *R*. v. *Placer Development Ltd*. (1985), 4 F.P.R. 366, 386 (Yukon T.C.)
5. *R*. v. *Cotton Felts* (1982), 2 C.C.C. (3d) 287 (Ont. C.A.)
6. *R*. v. *Cyprus-Anvil Mining Corp*. (1976), 2. F.P.R. 32 (Y.S.C.)
7. *R*. v. *Echo Bay Mines Ltd*. (1980), 3 F.P.R. 47 (Terr. Ct).
8. *R*. v. *FMC of Canada Ltd*. (1985) 4 F.P.R. 216 (B.C. Prov. Ct.)
9. *R*. v. *Kenaston Drilling (Arctic) Ltd*. (1973), 12 C.C.C. (2d) 383 (N.W.T.S.C.)
10. *R*. v. *Esso Resources*, [1983] N.W.T.R. 59 (N.W.T. Terr.Ct.)
11. *R*. v. *Panarctic Oils Ltd*. (1983), 43 A.R. 199 (N.W.T. Terr. Ct.)
12. *R*. v. *Neptune Resources Corp*. (Terr Ct., N.W.T.) (1991)
13. *R*. v. *Bremner* (1991), 83 Alta. Law Reports (2d) 125 (Alta. Prov. Ct.)

SCHEDULE "A" LIST OF AUTHORITIES

1. Statement of Agreed Facts dated October 7, 1994
2. *Fisheries Act*, R.S.C. 1985, c. F-14, as amended
3. *R*. v. *United Keno Hill Mines Ltd*. (1980) 10 C.E.L.R. 43 (Y.T. Ten. Ct.)
4. *R*. v. *Bata Industries Ltd*. (1992) 7 C.E.L.R. (N.S.) 245 (Ont. Ct. (Prov. Div.)), at; varied (1993) 11 C.E.L.R. (N.S.) 208 (Ont. Ct. (Gen. Div.))
5. *R*. v. *Echo Bay Mines Ltd*. [1993] N.W.T.J. No. 44 (Ten. Ct.)

6. *Canada (Environment Cab)* v. *Canada (Northwest Territories (Commissioner))* (1993) 12 C.E.L.R. (N.S.) 55 (N.W.T. Terr. Ct.)

7. *R.* v. *Jackson Bros. Logging Co. Ltd.* [1984] 4 W.W.R. 563 (B.C. Co. Ct.)

8. *Fisheries Act*, R.S.C. 1985, c. E-14, s. 40(1)

9. *R.* v. *J.A.C. Enterprises Limited*, unreported Order of Nemirsky P.C.J., St. Albert, November 1, 1993 (Alta. Prov. Ct.)

10. *R.* v. *Tioxide Canada Inc.* [1993] A.Q. no 852 (C. Que.)

11. *R.* v. *Shell Canada Products Ltd.*, unreported, Burnaby Reg. No. 43550, May 30, 1992 (B.C. Prov. Ct.)

12. *R.* v. *Amoco Canada Petroleum Co.* (1993) 13 C.E.L.R. (N.S.) 317 (Alta. Prov. Ct.)

13. *R.* v. *Cariboo Pulp & Paper Limited*, unreported, Quesnel (Information Nos. 14204 & 14256), December 12, 1990 (B.C. Prov. Ct.)

14. *R.* v. *Canadian Pacific Forest Products Ltd.* [1992] B.C.J. No. 1339 (S.C.)

15. *Canada (Ministère de l'Environnement)* c. *Canada (Ministère des Travaux Publics)* (1992) 10 C.E.L.R. (N.S.) 135 (C. Que.)

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SCHEDULE "B"

IN THE PROVINCIAL COURT OF ALBERTA

JUDICIAL DISTRICT OF EDMONTON

BETWEEN:

HER MAJESTY THE QUEEN

- and -

SUNCOR INC.

STATEMENT OF AGREED FACTS

1. The matter before the Court arises from a release into the House River on June 20-21, 1992, of a petroleum product mixture (50% diesel, 50% naphtha) from the pipeline operated by Suncor Inc. ("Suncor") between Fort McMurray ("the plant") and Edmonton (the "Pipeline").

THE PIPELINE

2. The Pipeline was constructed circa 1965-66 to move petroleum product from the plant operated by Great Canadian Oil Sands Ltd. (now Suncor) at Fort McMurray to tank storage in Edmonton.

3. The Pipeline is approximately 430 km long. It is 16 inches in diameter and its walls are 0.203 inches thick over the majority of its length.

4. The Pipeline is approved by the Energy Resources Conservation Board ("ERCB") pursuant to the *Pipeline Act* (Alberta) and is required to be operated and maintained in accordance with ERCB requirements.

5. There are a series of pumps, booster pumps and valves along the length of the Pipeline. At major river crossings, such as the Athabasca, House and North Saskatchewan Rivers, a valve is located on each side of the watercourse. Attached hereto as Schedule "A" is a plan showing the Pipeline and the valve locations.

6. The Pipeline is subjected to regular inspections and maintenance in accordance with ERCB requirements. Regular maintenance, at an approximate annual cost of $1.3 million (pre-1992) and $1.9 million (post-1992), includes:

(a) internal inspection "linologs" to detect pipeline metal wall loss (every 5 years);

(b) right-of-way inspection (every two weeks by fixed-wing aircraft; more frequently if there is construction activity in a given location);

(c) inspection of major river crossings at Athabasca and North Saskatchewan (every 2 years, using divers);

(d) all transmitters are calibrated once per year;

(e) remote-controlled valves were tested as Pipeline operations permitted; now they are tested every 3 months; manual valves are tested on an annual basis.

7. The Pipeline is operated from Sherwood Park, Alberta, from the Sherwood Park Control Centre ("SPCC") by a number of operators, each of whom works a shift in such a way that the SPCC is manned 24 hours per day, 365 days per year.

8. The Pipeline is operated by way of a computerized system known as the Supervisory Control and Data Acquisition (SCADA) system, which was installed in 1981 at a cost of approximately $1.4 million. The SCADA system is upgraded as technological improvements are realized to keep

the system up to date. The last upgrade prior to June 1992 were hardware improvements to the system.

9. SCADA transmits data from various points along the Pipeline to the SPCC and allows the SPCC operator to "communicate" with remote points on the Pipeline. Specifically, remote terminal units at valves along the Pipeline transmit pressure and flow rate data to the SPCC where they are monitored by the operator. These remote terminal units can be thrown into "fast scan" mode in order to transmit more data more often to the SPCC operator.

10. The Pipeline operates subject to maximum operating pressure ("MOP") limits established by the ERCB. MOP limits are set at levels less than the actual physical strength (i.e. the "minimum yield strength") of the Pipeline at any given point. There are different MOP limits for different portions of the Pipeline, with MOPs decreasing further south along the Pipeline. At the time of the Spill, the portion of the Pipeline in which the failure occurred was licensed by the ERCB to operate at a MOP of 6,550 kPa. The Pipeline normally operates at 4,100 kPa, but normal operating pressure can range from 1,400 kPa to 5,500 kPa.

11. Valves are equipped with over- and under-range pressure alarms which alert the SPCC operator to pressure anomalies occurring in the Pipeline. Pumps and booster pumps are set to shut down automatically upon certain pressure thresholds being reached. Over the course of a shift, the SPCC operator is expected to monitor pressure and flow rate data for anomalies.

12. The physical status of the Pipeline is monitored by way of a colour-coded, on-screen schematic diagram of the Pipeline. The schematic displays the entire Pipeline, or can be limited to particular segments for greater detail. The schematic illustrates valve status by depicting a closed valve in red, while open valves are depicted in green. The Pipeline path immediately following a valve is depicted in the same colour as that depicting the valve.

13. At some valve locations, such as at Wandering River (which is about at the halfway point on the Pipeline), there is a configuration of valves. At Wandering River, there are 6 valves in configuration as shown schematically on Schedule "C". Various combinations of open and closed valves at this point may mean that the product has a clear path through the configuration or it may not. In some circumstances, the last valve in the configuration may be open (green) yet there may not be a clear path from the first valve in the configuration to the last. It is the responsibility of the operator to ensure that a clear path is available.

14. SCADA also includes software for leak detection and prevention. The software in place, both today and in 1992, exceeded ERCB requirements for Liquid Petroleum Pipeline Leak Detection Prevention and Detection in Alberta. At the time of the Spill, the software was unable to detect leaks as efficiently during start-up (or "transient") conditions as it could detect leaks during normal (or "steady state") conditions. This difficulty was experienced by the industry as a whole. Since the Spill, Suncor has been able to modify its software to improve leak detection during transient conditions.

THE OPERATORS

15. In June, 1992, the SPCC operators, with the exception of the operator on duty on June 20-21, 1992 (Mark Burns), had between 6 and 12 years' experience operating the Pipeline.

16. Mark Burns had been employed as an SPCC operator since February, 1992, and had received on-the-job training for 3 1/2 months under Suncor's most senior operator, Larry Downing.

17. There was no industry standard for training of SPCC operators prior to June 1992. There is, as yet, no formal, industry-wide certification process for pipeline operators, though one is presently being developed.

18. Prior to June, 1992, Suncor had identified the need to upgrade and formalize its training program, including the preparation of a more comprehensive and "user-friendly" training and operations manual. The development of the program and the materials was approximately 50% complete at the time of the Spill. It was Suncor's intention to retrain all of its operators under the new program and with the new materials, once they were in place.

19. In addition to monitoring the on-screen schematic and the data gathered by SCADA, the SPCC Operators were and are expected to maintain a detailed logbook of the events on their shifts.

20. An operator is expected to highlight certain types of entries in the logbook to draw them to the attention of operators on subsequent shifts. Valve status was not an entry that required highlighting according to this system.

21. An operator coming on shift is expected to read all entries made in the logbook since the last time that operator was on shift.

22. The SPCC operators receive training in oil spill/emergency response. At the time of the Spill, Suncor had in place an "Oil Spill" Manual, which included a recommended shutdown procedure and an emergency response plan.

EVENTS LEADING UP TO THE SPILL ON JUNE 20-21, 1992

23. Owing to a plant upset at Fort McMurray in April, 1992, Suncor was unable to fully upgrade its crude oil. Batches of crude were delivered to Syncrude, where the crude was upgraded and then delivered to Edmonton by way of Syncrude's pipeline.

24. Delivering crude oil to Syncrude required the use of a "cross-tie" connection from Suncor's Pipeline to the Syncrude plant. It also required a special procedure to shutdown Suncor's Pipeline to prevent product from flowing south to Edmonton (the "Syncrude Procedure").

25. The Syncrude Procedure was recorded in what is known as the Daily Orders Book, which, among other things, contains any unusual Pipeline procedures. All of the SPCC operators read and initialled the Syncrude Procedure.

26. On June 18, 1992, one of the SPCC operators, Randy Gibbon, followed the Syncrude Procedure to initiate a delivery of crude oil to Syncrude. Because the Syncrude Procedure

essentially required the entire Pipeline south of the Athabasca River to be shut down, Gibbon took the opportunity to test all of the valves along the Pipeline to ensure their proper functioning. Testing of this nature requires each valve to be fully closed and re-opened-i.e. put through a full "stroke".

27. While Suncor puts its valves through a full stroke, ERCB guidelines require only a partial stroke.

28. When testing was completed, Gibbon left 4 valves closed: Athabasca River, Wandering River, North Saskatchewan River (north valve), and the Interprovincial Pipeline Delivery valve (Edmonton). Only the first and last valves were required to be closed for the Syncrude Procedure, but as an added precaution against upset during the shutdown period, Gibbon left the Wandering River and North Saskatchewan River (north) valves closed. Gibbon made an entry in the Logbook as to which valves he had re-opened but no entry as to the four valves left closed.

29. The delivery to Syncrude initiated during Gibbon's shift on June 18, 1992, was completed shortly after Mark Burns came on shift on the evening of June 20, 1992. Burns had last been on shift on June 19. As required, he had read the logbook entries made by Randy Gibbon on June 18 and was aware that at least some of the Pipeline valves had been tested by Gibbon.

30. When the delivery to Syncrude was complete and a delivery of different product was ready for shipment to Edmonton, Burns followed the Syncrude Procedure to "swing" back to Edmonton delivery. Following that procedure, he opened the Athabasca River and Interprovincial Pipeline Delivery valves and started the Scotford Density Pump.

31. Burns did not see that two valves at Wandering River and the North Saskatchewan River were still closed.

32. The following is the sequence of events immediately prior to the Spill. (All times are in MST. "Tar Island" refer to the main pumping station at the plant near Fort McMurray.)

21:07 Pumps #3 and #4 at Tar Island put on line manually pumping a mixture of 50% diesel, 50% naphtha.

21:35 Marianna Booster brought on line for start-up assistance

21:37 High pressure alarms sound at Marianna Booster and House River (both up and downstream)

21:39 Wandering River over-range pressure alarm sounds meaning that MOP limit has been exceeded.

21:41 Marianna Booster automatically shuts off due to high discharge pressure.

21:43 Tar Island pumps #3 and #4 are taken off-line due to high pressure.

21:45 Burns notices that the Wandering River and Saskatchewan River valves are closed and opens them.

21:55 Tar Island pumps #3 and #4 come back on line

22:02 Tar Island flow rate is back up to 313 m3/hour, but very little flow is registering at Edmonton Meter (93 m3/hour)

22:20 Burns notes entry in Logbook: "Do we have a leak?"

22:45 Burns telephones Tar Island and asks them to increase rate of flow.

22:56 Burns ensures that Athabasca River valve is fully open because Tar Island rate is increasing but little flow is registering in Edmonton.

22:58 Burns is seeing anomalous readings from House River and puts the remote terminal unit there into fast scan to verify the data he is receiving.

23:00 Barry Ford of Rio-Alto Exploration is in the vicinity of the House River at the Waskikegan Campground. He smells a very strong diesel odour.

23:07 The Tar Island operators are seeing normal conditions and so put pumps #1 and #2 on line.

23:20 Barry Ford calls Mark Burns at the SPCC reporting that he could smell diesel and saw a mist in the air near the House River.

23:22 Burns closes the valve on the north bank of the House River and calls his supervisor, Trevor Dane, to advise him of a possible leak.

23:23 House River North valve re-opened to check for pressure loss across the valve.

23:29 House River North valve closed again.

23:30 Wandering River valve closed. Trevor Dane initiates Suncor's Emergency Response Plan by contacting his immediate superior, Joel Croteau.

23:31 All four Tar Island pumps go off line and the Athabasca River valve is closed.

24:00 Barry Ford contacted by Suncor, asked for more information on spill; valley is full of mist and river covered in light oil June 21, 1992:

> 00:20 Emergency equipment sent to location while Suncor personnel enroute to site from Fort McMurray.
>
> 00:51 Joel Croteau reports spill to Energy Resources Conservation Board.

01:07 Joel Croteau reports spill to Alberta Environment.

01:11 Oil Sands Group Oil Spill Response Team is activated.

01:30 Doug Hankinson of Suncor confirms to SPCC there is product on the river, from spill 600 metres uphill on south side of House River. Emergency equipment sent to location:

02:00 Stopple Tee and plug are installed in the Pipeline to stop the leak.

03:00 Dike/Dam structure is built on south bank of House River to prevent flow of product into River.

33. The Suncor Emergency Response Plan in effect in June, 1992, defined an "emergency" as "any unforeseen happening or situation requiring prompt action, such as fires, explosions, and widespread threat to loss of life, health, property destruction and/or environmental damage".

34. The Suncor Oilsands Pipeline ("OSPL") Training Manual in effect in June, 1992, stated that the primary purpose of the SPCC operator was to ensure that a leak in a pipeline is detected as soon as possible.

35. The OSPL manual indicated that a "large leak" should be easy to detect. The primary indications the operator would get are listed as follows:

* large unexpected pressure drops at specific stations, followed by pressure drops at a slower rate at the rest of the stations;

* flowrate decrease at delivery point;

* an indication on the computer display of

* volume in being greater than volume out;

* a large negative linepack value;

* a large negative overshort.

THE SPILL

36. The Pipeline had ruptured at a point just south of the check valve located on the south bank of the House River. There had been a previous rupture of the Pipeline on the north side of the River caused by a landslide on the north slope of the valley. The repairs to the Pipeline in 1974 included the installation of a "stopple" located on the south bank of the river in order to isolate the break which had occurred on the north side of the valley. A stopple is a device which is placed on a pipeline to insert a plug into the line and block the flow. During the 1974 repair, a "hot tap" fitting was also welded onto the line as part of the leak isolation and repair procedure. In addition,

replacement pipe was installed at the surface on the north side of the River to minimize the likelihood of a break in the event of another landslide.

37. In 1978, as a further preventative measure, Suncor excavated this portion of the Pipeline in order to install a check-valve----designed to prevent the backward flow of product in the Pipeline and out of any rupture that might occur north of the check-valve. A diagram showing the various fittings at the location of the 1992 rupture is attached as Schedule "B."

38. In October 1991 Suncor had arranged for the inspection of this portion of the Pipeline as part of its overall Pipeline Maintenance Integrity Program. Suncor had contracted Canspec Group Inc. (Materials Engineering and Testing) to carry out the physical inspection of the Pipeline in October 1991. The particular focus of the inspection was the examination of the girth (i.e. circumferential) welds attaching repair sleeves to the Pipeline. This work was undertaken in response to newly promulgated CSA standards for such welds because of an industry wide concern about the failure of such welds. After the excavation of a repair sleeve in the vicinity of the House River, a decision was made to inspect a nearby stopple fitting. The Pipeline was excavated to expose the stopple for inspection, an excavation that also revealed the nearby hot tap.

39. Because the hot tap was welded too close to the Pipeline, magnetic particle testing equipment could not be placed under the flange to test the weld; therefore, it was not possible to carry out anything but a visual examination. It was noted that the pipeline was "pushed in" at the location of the hot tap. The Canspec inspector noted the condition to be abnormal and brought this condition to the attention of the Suncor representative who was present. A photograph was taken of the hot tap fitting by the Suncor representative, but nothing further was done to inspect or repair the hot tap prior to the Spill in June 1992.

40. Following the Spill, the section of failed Pipeline was inspected by Canspec which formed the opinion that the poor quality of the weld likely would have been grounds for rejecting the weld when the hot tap was installed in 1974. It was the further opinion of Canspec that the combination of the poor weld and the dent in the Pipeline at the location of the hot tap had likely propagated a fatigue crack which finally ruptured owing to the high pressures that had built up on June 20, 1992, when product was being pumped against the closed Wandering River valve. Canspec also speculated that there may have been a small leak from the fatigue crack prior to the time of the Spill.

41. Based on SCADA information from the time of the failure, the pressure was subsequently calculated to be 6,930 kPa at the failure point, in excess of the MOP of 6,550 kPa for which the Pipeline was licensed by the ERCB. The highest recorded pressure at or near the time of failure (7,704 kPa), which occurred at Wandering River, was less than 85% of the minimum yield strength of the pipe.

42. The highest recorded pressure at the House River at or near the time of failure was 6,376 kPa. At the Marianna Booster, 12 miles upstream, the recorded pressure was 6,433 kPa, while at the Wandering River block valve, 43 miles downstream, the recorded pressure was 7,704 kPa. The distance from the Marianna Booster to the Wandering River block valve was approximately 55

miles of pipeline, the whole of which was operating at high pressure, near or above MOP prior to the Spill.

43. Following the rupture on June 20, 1992, and after leaving the Pipeline, the product travelled approximately 600 m down the south bank of the House River before entering it. The total volume of product spilled is estimated to be 1,200 m3 or 7,600 barrels ("BBL") of which 2,100 BBL is estimated to have entered the House River. By the end of August, 1992, there had been recovery of approximately 2,700 BBL of product, of which 1,180 BBL were recovered from the River. Owing to the nature of the product mixture (50% diesel, 50% naphtha) it is estimated that approximately 2,000 BBL of product "flashed" (evaporated) into the air. More product saturated the river bank and was partially recovered over the course of the ensuing year by an elaborate flushing and collection program implemented by Suncor. In addition, a water collection and treatment system was installed to treat all run off water from the 1993 spring thaw. Only one barrel of product was recovered during this 1993 work suggesting that the site had been effectively cleaned up.

44. The Spill affected the terrestrial environment on the south bank of the House River down which the product flowed after leaving the Pipeline. The Spill also affected the aquatic environment as a result of the product entering the House River.

45. From its source upstream of the location of the Spill to the point where it enters the Athabasca River in the northeast part of Alberta, the House River is, and at all material times was, fish habitat as defined in the *Fisheries Act*.

46. The House River is, and at all material times was, a water frequented by fish. A fisheries biologist employed by Alberta Fish and Wildlife surveyed the House River and conducted fish sampling on the River on June 25 and June 26, 1992. He observed fish populations in the House River below the Spill site (downstream) at levels at least 80% below fish populations observed above the Spill site (upstream). Significant mortality was observed for all species of fish. The biologist concluded that it was likely that all sport species present at the time of the Spill (walleye, pike, Arctic grayling and Mountain whitefish) suffered total mortality. Dead fish, which may have become stranded while attempting to avoid the Spill material, were observed well away from the water's edge.

47. There were acute impacts to the benthic communities on the river bottom and to the fish populations extending 90 km downstream from the point of the Spill, though major effects were confined to the first 60 km downstream. Fish declined both in absolute numbers and in number of species, while benthic species were also reduced. The effects would not have extended into the Athabasca River owing to dilution of the product after entering it. Environmental consultants retained by Suncor to examine the effects of the Spill predicted that, because of the nature of the materials entering the River, the benthic communities (e.g. bacteria, algae, macrobenthos) and perhaps fish populations would have returned to pre-Spill levels within 30 to 90 days following the Spill. In fact, some fish were found "re-colonizing" the area of the Spill within 7 days of the Spill.

48. The river bank affected by the Spill was also expected to recover relatively quickly and was aided by a soil remediation program undertaken by Suncor. Owing to the natural bacterial

degradation of hydrocarbons in the soil, Suncor has reported that long term effects of the Spill are not expected.

EVENTS FOLLOWING THE SPILL

49. As part of the containment and cleanup effort, Suncor utilized five helicopters and five Oil Spill Containment units. A total of 5 control points were established, 3 of which were not accessible by road. A minimum response would have established 2 control points and incurred approximately half the cost. To date, Suncor has spent in excess of $2.2 million in immediate and long term monitoring and remediation of the effects of the Spill.

50. In particular, to prevent "leaching" into the House River of product that may have soaked into the soil, Suncor constructed a collection and treatment system at the base of the slope. Collection efforts were aided by flushing the hillside during spring and summer conditions. Ten groundwater monitoring wells were installed at the base of the hill and a water monitoring program implemented. These efforts continued through the spring and summer of 1993 until Suncor was satisfied that the Spill had been cleaned up.

51. Suncor has completed a full assessment of the environmental impacts of the Spill, followed by rigorous monitoring and extensive remediation, particularly of the river bank affected by the Spill. The monitoring and remediation program included the following components:

(a) comprehensive river sediment and water survey program;

(b) comprehensive vegetation and soils survey program;

(c) biofeasibility study and subsequent nutrient program (to aid in degradation of hydrocarbons in soil)

(d) site restoration.

52. In October 1992, Suncor accelerated the inspection program that had revealed the hot tap near the House River. The accelerated program involved the excavation and inspection of all Pipeline appurtenances----repair sleeves, hot taps, stopples and other "by-pass" type fittings. Corrosion anomalies were also excavated and inspected. In all, 172 appurtenances and/or anomalies were inspected. As a result of this inspection, Suncor implemented a major pipeline excavation, purge id "cut-out" program completed in May 1993. Approximately 80 anomalies at 48 cut-out sites were removed during the program. Only 9 of the 40 cut-out sites were, in fact, required to comply with ERCB requirements. A major pipe replacement at Goathead Creek was also completed as part of this program.

53. This inspection program was one component of an overall integrity program for which Suncor hired a number of consultants to carry out a review of Suncor's Pipeline operation. The review is divided into 3 components:

Mechanical Integrity:

* Hydraulic Review * Pump Stations * Quality of Metering * Lock-out Systems *
Pipeline Defect and Repair Assessment * Procedures

Systems Integrity:

* Interface of equipment to SPCC * Quality and calibration of end devices * Software
* Line-balance calculation methods * System control during start-up and shutdown

Operations Assessment:

* Operator Training * Technical Participation/Support * Follow-up Activities *
Field Supervision * Inspection Procedures * Maintenance Programs * Defect
Assessments * Operating Philosophy * Operating Procedures

This work has been carried out and the Integrity Program continues.

54. A number of software upgrades were discussed and some implemented. In particular, an "inter-lock" system was added to SCADA, which prevents a mainline pump or booster from starting if a mainline valve has been left closed. In addition, SCADA was upgraded to improve leak detection capability.

55. The cost of these initiatives breaks down as follows:

Integrity Program $ 938,709 (Excavation, inspection, repair) Goathead Creek 304,898 (Pipe replacement, hill stabilization) Purge 419,113 (Removal of product from Pipeline) Cut-Out 1,154,562 (Defects removed from Pipeline) Leak Detection 92,906 (SCADA improvements)

TOTAL $2,910,188

56. Suncor's operations manual was amended to include a specific requirement to ensure that all downstream valves are open before pumping begins.

57. Revised and integrated operations and training manuals have been completed and put into use and all operators have been given further training using the new materials.

AGREED TO this 7th day of October, 1994.

DEPARTMENT OF JUSTICE (CANADA)

Per: - Wesley W. Smart Counsel for Her Majesty the Queen

MILNER FENERTY

Per: Dennis R. Thomas, Q.C. Counsel for Suncor Inc.

NORTHWEST TERRITORIES SUPREME COURT

[Indexed as: R. v. Northwest Territories (Commissioner) #6]

Between Her Majesty the Queen on the information of Neil Bruce Scott, Enforcement and Compliance Officer, respondent and cross-appellant, and The Commissioner of the Northwest Territories, appellant and cross-respondent

de Weerdt J.

Yellowknife, November 14, 1994

***Fisheries Act*, R.S.C. 1985, c. F-14, ss 2, 34(1), 34(2), 36(3), 40(2)(a), 79.2, 79.2(f) – wording of payment order under s. 79.2(f) – project to protect "marine life" is too broad – order cannot purport to bind third parties**

Defences – due diligence – lack of due diligence by the offender is not an aggravating fact for sentencing

Sentencing -- $100,000 fine imposed – public deserves protection from government officials who flout the law – primary principles for sentencing are denunciation and deterrence – Parliament's increase of fines under the Act demonstrates gravity of the offence – aggravating factors include previous incidents and the offender's public responsibility towards the environment

Summary: This is an appeal by the accused, Commissioner of the Northwest Territories, of a sentence imposed by the Territorial Court for a conviction under s. 36(3) of the *Fisheries Act* and a cross-appeal of the sentence by the Crown.

The incident resulting in the charges and conviction occurred in Iqualuit when the west dyke of the Iqualuit sewage lagoon washed out, releasing approximately 56,000 cubic meters of raw untreated sewage and municipal waste directly into the waters of Koojesse Inlet, being waters frequented by fish. The west dyke had failed at least 5 times in the 10 years prior to the offence. A diversion ditch constructed to divert spring run-off from the lagoon was not maintained. Various construction works in the lagoon's watershed allowed an increased flow of water into the lagoon and a warmer than usual spring resulted in snowmelt overruning the drainage ditch and filling the lagoon. Efforts to repair the situation were unsuccessful and the seepage continued for an additional 8 days.

The appellant was convicted at trial and was sentenced to pay a fine of $49,000 plus a payment order of $40,000 under s. 79.2(f) of the *Fisheries Act*. The payment order was to be paid to the federal Department of the Environment to promote the conservation and protection of fish habitat in the Northwest Territories, specifically to be used to design, construct and operate a marine life aquarium at the Science Institute at Iqualuit ($20,000) and to facilitate studies, research or other

programs related to the improvement of sewage and waste treatment in the Northwest Territories ($20,000 plus interest).
With respect to the payment order, the learned justice agreed with the appellant that the order went beyond the terms of s. 79.2 of the *Fisheries Act*, by mentioning, for example "marine life" which is broader than "fish" or "fish habitat" and that the order purported to bind third parties not a party to the action. The justice increased the payment order to $100,000 and reworded the terms to fall within the requirements of s. 79.2.

With respect to the fine, the appellant argued that it was excessive, given the circumstances of the case or alternatively, that a token fine with the balance directed to the payment order would have been sufficient. The Crown argued that the fine should be increased to reflect the seriousness of the violation and the circumstances.

The learned justice increased the fine from $49,000 to $100,000 finding that the fine should better reflect the seriousness of the violation as recognized by the public through Parliament. The status of the appellant calls upon the court to protect the public from the illegal actions or inactions of government officials. Given the potential harm and sheer volume of the discharge, the incident constitued a major violation. Aggravating factors included the history of previous lagoon failures, the absence of remorse, the identity and public status of the offender and the appellant's special responsibilities towards the environment.

An award of costs of $10,000 was made in favour of the Crown in respect to an application by the appellant to adjourn the hearing of his conviction appeal sine die, which was characterized by the learned justice as political interference with the conduct of the appeal.

Held: The appeal was dismissed and the cross-appeal allowed. The payment order was increased to $100,000, the fine was increased to $100,000 and costs of $10,000 were ordered against the appellant.

REASONS/MOTIF:

John Donihee, Counsel for the Appellant
John K. Cliffe and Brett O. Webber, Counsel for the Respondent

[para1] de WEERDT J.:-- The Commissioner of the Northwest Territories appeals against the sentence imposed on him by a judge of the Territorial Court upon his conviction of a contravention of s. 36(3) of the *Fisheries Act*, R.S.C. 1985 c. F-14 (as amended) pursuant to s. 40(2)(a) of that *Act*. The Commissioner's appeal against the conviction was dismissed on July 22nd 1994.

[para2] In addition, the Crown (represented by the Attorney General of Canada) cross-appeals against the sentence and asks for costs of the appeal against conviction.

[para3] The sentence comprises a fine together with a payment order pursuant to s. 79.2(f) of the *Fisheries Act*. The fine, totalling $49,000, is calculated by adding $40,000 for an initial major contravention on June 1st 1991 together with $1,000 for each of the nine days immediately following, when that contravention was found to have continued (as charged). The payment order

is in a further amount of $40,000. The grand total to be paid is therefore $89,000 as ordered by the sentencing judge.

[para4] These appeals come before this Court at the first appellate level under Part XXVII of the *Criminal Code*.

[para5] Although the conviction appeal was dismissed, the conviction was amended by deleting June 1st 1991 and substituting June 2nd 1991 as the first day of the period during which the offence was committed. The period was thereby reduced to nine days from the ten mentioned in the conviction at first instance. It is not in dispute, however, that the material facts remain otherwise unchanged for the purposes of this appeal.

[para6] Pursuant to s. 822 of the *Criminal Code*, s. 687 applies. It reads as follows:

> 687. (1) Where an appeal is taken against sentence, the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may on such evidence, if any, as it thinks fit to require or to receive,
>
> > (a) vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or
> >
> > (b) dismiss the appeal.
>
> (2) A judgment of a court of appeal that varies the sentence of an accused who was convicted has the same force and effect as if it were a sentence passed by the trial court.

[para7] The sentence under appeal is not "fixed by law" in the sense that it cannot be varied. The first step to be taken, therefore, is to determine the fitness of that sentence.

[para8] Clearly, the amendment made to the conviction requires a reconsideration of the sentence, if only because the period during which the offence continued has been shortened by one day. In that sense, at least, the sentence no longer fits the facts set forth in the conviction.

[para9] Both parties submit that the amount of the fine is inappropriate. For the Commissioner it is argued that the amount is excessive, in all the circumstances; and, in the alternative, that a token fine would suffice with the bulk of the penalty being instead in the form of a payment order pursuant to s. 79.2(f) of the *Fisheries Act*. Crown counsel contends that the total penalty, be it in the form of a fine or a payment order, should be of a magnitude which better reflects the seriousness of the violation as recognized by Parliament in that *Act*; and which likewise better reflects the circumstances of the case. It is also urged on behalf of the Crown that the fine should be increased, rather than reduced, to better compensate the Crown for the expenses which it incurred in the prosecution of the trial.

[para10] In addition, the Commissioner submits that the present payment order should be set aside or varied at least in part, having regard to the implications of the order for other parties, not party to the case, who are thereby affected.

[para11] These submissions require at least a brief examination of the facts established in evidence at trial, both in reference to the offence and in reference to the offender (nominally the Commissioner, but in reality the officials who had responsibility for the events comprising the offence in question).

[para12] In addition, it is to be noticed that s. 40(2) of the *Fisheries Act* was amended in 1991 (with effect on Assent, which was given on January 17th of that year). The amended subsection reads:

> 40. (2) Every person who contravenes subsection 36(1) or (3) is guilty of
>
> > (a) an offence punishable on summary conviction and liable, for a first offence, to a fine not exceeding three hundred thousand dollars and, for any subsequent offence, to a fine not exceeding three hundred thousand dollars or to imprisonment for a term not exceeding six months, or to both; or
> >
> > (b) an indictable offence and liable, for a first offence, to a fine not exceeding one million dollars and, for any subsequent offence, to a fine not exceeding one million dollars or to imprisonment for a term not exceeding three years, or to both.

[para13] Prior to the amendment, the maximum fine upon summary conviction for a violation of s. 36(3) of the *Act* was $5,000 for a first offence and $10,000 for a second offence. The 1991 amendment therefore represents a substantial increase in public recognition of the potential gravity of such an offence.

[para14] Furthermore, the *Fisheries Act* was then also augmented, as to the penalties which a court may impose in such cases, by the addition of s. 79.2, which states:

> 79.2 Where a person is convicted of an offence under this *Act*, in addition to any punishment imposed, the court may, having regard to the nature of the offence and the circumstances surrounding its commission, make an order containing any one or more of the following prohibitions, directions or requirements:
>
> > (a) prohibiting the person from doing any act or engaging in any activity that may, in the opinion of the court, result in the continuation or repetition of the offence;
> >
> > (b) directing the person to take any action the court considers appropriate to remedy or avoid any harm to any fish, fishery or fish habitat that resulted or may result from the commission of the offence;
> >
> > (c) directing the person to publish, in any manner the court considers appropriate, the facts relating to the commission of the offence;
> >
> > (d) directing the person to pay the Minister an amount of money as compensation, in whole or in part, for the cost of any remedial or preventive action taken by or

> caused to be taken on behalf of the Minister as a result of the commission of the offence;
>
> (e) directing the person to perform community service in accordance with any reasonable conditions that may be specified in the order;
>
> (f) directing the person to pay Her Majesty an amount of money the court considers appropriate for the purpose of promoting the proper management and control of fisheries or fish habitat or the conservation and protection of fish or fish habitat;
>
> (g) directing the person to post a bond or pay into court an amount of money the court onsiders appropriate for the purpose of ensuring compliance with any prohibition, direction or requirement mentioned in this section;
>
> (h) directing the person to submit to the Minister, on application by the Minister within three years after the date of the conviction, any information respecting the activities of the person that the court considers appropriate in the circumstances; and
>
> (i) requiring the person to comply with any other conditions that the court considers appropriate for securing the person's good conduct and for preventing the person from repeating the offence or committing other offences under this *Act*.

[para15] For present purposes, counsel agree that I need only consider paragraph 79.2(f). I have nevertheless quoted the entire section here so that the context of that paragraph may be more conveniently understood.

The Facts

1. The offence

[para16] The facts of the offence are more fully set out in the reasons given by the sentencing judge both on conviction (reported at (1994) 1 W.W.R. 441, 12 C.E.L.R. (N.S.) 37) and on sentence (reported at (1994) 1 W.W.R. 458, 12 C.E.L.R. (N.S.) 55). I shall summarize here.

[para17] On or about June 2nd 1991, the west dyke of the Iqaluit sewage lagoon washed out, releasing approximately 56,000 cubic metres (or 12.3 million gallons) of raw untreated sewage and municipal waste directly into the waters of Koojesse Inlet, an arm of the sea within Frobisher Bay on the south shores of Baffin Island, these being waters frequented by fish. The material flowing from the lagoon into the sea was a "deleterious substance" as defined by s.34 of the *Fisheries Act*, which reads in part:

> 34. (1) For the purposes of sections 35 to 43, "deleterious substance" means
>
> (a) any substance that, if added to any water, would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is

rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water, or

(b) any water that contains a substance in such quantity or concentration, or that has been so treated, processed or changed, by heat or other means, from a natural state that it would, if added to any other water, degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water,

and without limiting the generality of the foregoing includes

(c) any substance or class of substances prescribed pursuant to paragraph (2)(a),

(d) any water that contains any substance or class of substances in a quantity or concentration that is equal to or in excess of a quantity or concentration prescribed in respect of that substance or class of substances pursuant to paragraph (2)(b), and

(e) any water that has been subjected to a treatment, process or change prescribed pursuant to paragraph (2)(c);

* * *

(2) The Governor in Council may make regulations prescribing

(a) substances and classes of substances,

(b) quantities or concentrations of substances and classes of substances in water, and

(c) treatments, processes and changes of water

for the purpose of paragraphs (c) to (e) of the definition "deleterious substance" in subsect ion (1).

[para18] It is to be noted that the terms "fish" and "fish habitat" are defined by the *Fisheries Act*, as follows:

2. In this *Act,*

"fish" includes shellfish, crustaceans, marine animals and the eggs, spawn, spat and juvenile stages of fish, shellfish, crustaceans and marine animals.

34. (1) For the purposes of sections 35 to 43,

> "fish habitat" means spawning grounds and nursery, rearing, food supply and migration areas on which fish depend directly or indirectly in order to carry out their life processes.

[para19] In convicting the Commissioner, the Territorial Judge found that this event occurred as a result of the Commissioner's lack of due diligence.

[para20] The sewage lagoon was located in a depression bounded by elevated ground on three sides. It was located a few hundred metres from the town site of Iqaluit, a very short distance from the tidal waters of Koojesse Inlet. The contents of the lagoon were contained by the existing hills and two dykes, of which the main one was known as the west dyke. The lagoon is a natural drainage basin for the surrounding area. It held approximately 56,000 cubic metres (or 12.3 million gallons) of sewage and municipal waste when full.

[para21] The west dyke had failed completely on two specific previous occasions. In one instance it was washed out by a high tide. On another, in 1987, Spring run-off from the surrounding hills flooded the lagoon causing the dyke to give way. A diversion ditch was then dug in an attempt to divert such run-off away from the lagoon. The evidence shows that the west dyke had failed no less than five times in the ten years immediately before the occurrence of the offence now under consideration. These facts were known to departmental officials under the Commissioner.

[para22] The diversion ditch dug following the 1987 dyke failure was not maintained. At the time of the offence in question that ditch had become so shallow that it was unable to contain the run-off at a point where the ditch made a right angle turn. As a result, the run-off entered the lagoon, already overfull, causing it to overflow and burst the dyke.

[para23] A major construction project had been undertaken on the lagoon's watershed earlier in 1991. This involved the construction of roads, aircraft taxi-ways, hangars and barracks, all quite close to and uphill from the lagoon. Among other things, the project included the replacement of nearby drainage culverts, increasing their capacity and altering the topography. These works made it possible for an increased flow of water to pour into the lagoon, given the state of the diversion ditch. Though all this was known to officials under the Commissioner, nothing was done to better protect the lagoon.

[para24] June 1st 1991 was warmer than usual for that time of year at Iqaluit. Snowmelt began to run off the high ground above the lagoon. It overran the drainage ditch at the right angle turn and flowed into the already overfull lagoon. The results earlier mentioned then followed on or about June 2nd 1991.

[para25] Repairs were immediately made in haste by municipal officials acting ad hoc in default of any contingency plan or resources for the purpose on the part of the Commissioner. These repairs were nevertheless insufficient to prevent the continued seepage of raw sewage from the lagoon into the waters of Koojesse Inlet, at an estimated rate of five gallons a minute or 7,200 gallons a day. This seepage continued for the eight days immediately following, that is to say from and including June 3rd to and including June 10th 1991.

[para26] Quite apart from public health concerns which lie beyond the scope of the *Fisheries Act*, the evidence before the Territorial Judge led him to find that the outflow from the lagoon was in fact toxic to "fish" as defined by the *Act*. It is immaterial that "not one dead fish was ever reported as a result of the failure of the sewage lagoon". Iqaluit is named for the presence of fish in the waters here in question; it is and has long been a centre of aboriginal fishing activity.

[para27] The circumstances in which the offence took place do not reveal that this occurrence was the result of any unforeseeable, unpreventable, or completely unexpected event amounting to an "Act of God", or that the Commissioner (or his officials) should be absolved of all responsibility because of the contributing actions of a third party. And the licence relied upon by the Commissioner which had been issued to the Town of Iqaluit pursuant to the *Northern Inland Waters Act*, R.S.C. 1985, c. N-25 is of no avail to the Commissioner given the limited scope of that *Act*, and consequently of the licence. Nor is the licence to be considered in extenuation of the Commissioner's lack of due diligence, in the circumstances, given that the Commissioner and his officials cannot be looked upon as lacking competent legal advice. There is nothing to show that the Commissioner (or anyone under him) was misled into any officially induced error by reason of the licence, in the sense that any official or tribunal acting under either the *Northern Inland Waters Act* or the *Fisheries Act* was responsible for any such inducement.

2. The offender

[para28] The Commissioner is the chief executive officer of the Northwest Territories pursuant to s. 3 of the *Northwest Territories Act*, R.S.C. 1985, c. N-27, having the responsibility of administering the government of these Territories under instructions given from time to time by the Governor General in Council or the Minister of Indian Affairs and Northern Development of Canada, as provided by s. 4 of the *Act*. And while the powers of the Commissioner include those vested before September 1st 1905 in the Lieutenant Governor or Lieutenant Governor in Council of the Northwest Territories, as declared by s. 6 of the *Act*, the office of Commissioner was, at the relevant times, held by an official of the Government of Canada with deputy ministerial rank. Nevertheless, by 1991, the functions exercised by the Commissioner in person had become largely ceremonial and their executive character had become restricted to the point that he could by then be regarded as holding a constitutional position analogous to that of a provincial Lieutenant Governor, his administrative and executive powers being exercised almost exclusively through the Executive Council of the Northwest Territories (and its ministerial members, acting through their subordinates in the public service of the Northwest Territories).

[para29] For purposes of the sentence under appeal, it is therefore the Executive Council and its members, more particularly those having responsibility for matters which encompass the offence in question, and not the Commissioner as an individual, whose actions or lack of action are to be considered. These officials are today (as they were in 1991) in the appropriate position to formulate public policy and take administrative and executive action on behalf of the Commissioner, so as to ensure that subordinate officials in the public service of the Northwest Territories conduct the business of the Territorial government in such a manner that the offence will not be repeated and so that other such offences are prevented from occurring. The Commissioner, for present purposes, is therefore only a convenient nominal or symbolic representative of those who have the relevant political authority and the means to exercise it.

[para30] I have, since the inception of the appeal, described the defendant appellant as the Commissioner more for purposes of clarity and conciseness of expression than anything else. It is, besides, extremely confusing to see the Crown mentioned as both prosecutor and defendant in a case subject to criminal procedure. By describing the defendant appellant in less than regal terms, I have endeavoured to focus attention on both the subordinate constitutional status of that party and the present-day political realities of government action in the Northwest Territories at the Territorial level.

[para31] To illustrate this further reference may be had to the statement made in the Legislative Assembly of the Northwest Territories on February 15th 1989 (No. 8-89(1), by the Honourable Dennis Patterson, M.L.A., then Government Leader) on the subject of environmental contaminants. In that statement the Government Leader, speaking on behalf of the Executive Council (and, by implication, the Legislative Assembly as a whole) declared that the problems posed by such contaminants "will not be resolved without strong, deliberate and co-ordinated action by all levels of government, industry, the scientific community and the support of the public". He went on to add:

> Mr. Speaker, environmental contaminants are a complex issue. The dangers of contaminants and how they get into wildlife resources is not fully understood, nor is it easy to translate information on the problem into the aboriginal languages of the Northwest Territories.

[para32] That the Commissioner, meaning the Government of the Northwest Territories as a whole, was thus well aware of the importance of environmental issues in 1991, is therefore self-evident. It is not without all relevance, perhaps, that the Government Leader who made these statements was also the Member of the Legislative Assembly for Iqaluit.

The Payment Order

[para33] Under the order made by the sentencing judge pursuant to s. 79.2(f) of the *Fisheries Act*, the Commissioner is required to pay $40,000 to the Department of Environment of Canada "for the purpose of promoting the conservation and protection of fish or fish habitat in the Northwest Territories".

[para34] The order then goes on to specify that this sum is to be used for purposes which I have paraphrased as follows:

1. $20,000 for designing, constructing and operating a marine life aquarium at the Science Institute at Iqaluit with the intention that the aquarium shall serve as a focal point for research and study of marine life and promote related educational objectives (the project to be one of the federal Department of Environment whether or not in partnership with the federal Department of Fisheries and Oceans, the federal Department of Indian Affairs and Northern Development, or the Arctic College Environmental Technology Program).

2. 20,000 (with any accrued interest) for the facilitation of studies, research or other programs related to the improvement of sewage and waste treatment in the Northwest Territories.

[para35] On behalf of the Commissioner, it is submitted that this order goes beyond the scope of s. 79.2(f), which only empowered the sentencing judge to direct the payment of an appropriate amount to "Her Majesty ... for the purpose of promoting the proper management and control of fisheries and fish habitat or the conservation and protection of fish or fish habitat".

[para36] It is immediately apparent that the order, except for its reference to the Department of Environment of Canada in lieu of "Her Majesty", is couched in both the general terms of s. 79.2(f) and additional terms which purport to give specific content to the general terms. It is the additional terms which give rise to objection on the part of the Commissioner.

[para37] The objection goes further than the specific purposes mentioned. It is contended, in my view correctly, that parties not before the Court are mentioned in the order in a manner which purports to bind them. For instance, the aquarium is contemplated as to be constructed and operated at the Science Institute, an entity not represented before the sentencing judge and whose consent to involvement is not shown as having been given. There is nothing in the *Fisheries Act* which in any way empowered the sentencing judge to so involve the Science Institute in the project. Likewise, although the Department of Environment of Canada was evidently involved in the initiation of the prosecution in this case, that Department was not itself represented before the sentencing judge. Nothing in the *Act* empowered him to make an order with binding effect on that Department.

[para38] Although these submissions may seem mere legal formalism, it is readily apparent that they do have actual substance. The sums mentioned in the order are ex facie mere token amounts, given the purposes to which they are to be directed. There is nothing in evidence to show that there is any realistic expectation that the money would ever be spent for those purposes.

[para39] Not that the design, construction and operation of a marine life aquarium at Iqaluit, whether at the Science Institute or elsewhere, does not appear to be very laudable, should the necessary funding and many other requirements be forthcoming. Leaving aside the argument that the order is ultra vires since "marine life" encompasses more than "fish" and "fish habitat", even as those terms are inclusively defined by the *Fisheries Act*, it is enough to say that the order nonetheless raises too many other questions, in the absence of evidence which would provide satisfactory answers, to be allowed to stand in respect of its additional specific terms.

The Fine

[para40] As already noted, the amendment made to the conviction requires that the fines imposed for the June 1st and 2nd 1991 violations be reconsidered, in any event.

[para41] The total fine of $49,000 is approximately equal in amount to the out-of-pocket expenses incurred by the Crown in the conduct of the trial. This does not include any counsel fees or costs of preparation by counsel. It might be thought, therefore, that a fine of this amount would serve as at least partial compensation to the Crown in respect of its necessary prosecution expenses.

The objection that any fine would be merely an intergovernmental transfer of the taxpayer's dollars could thus be met on the basis that those dollars should be allocated from the offender's bank account rather than from the federal Consolidated Revenue Fund.

[para42] Had the Commissioner acknowledged his responsibility for the offence by entering a guilty plea, thus eliminating the need for a trial, those out-of-pocket expenses need not have been incurred. And other burdens of conducting the trial could thus have been minimised. In that event, no doubt, the remorse which would have been evidenced could have been taken into account when it came to imposition of the sentence. No such responsibility was acknowledged and consequently no remorse was shown. The absence of due diligence which led to the offence was instead followed by a brazen denial of all responsibility for it.

[para43] It was of course fully within the legal right of the Commissioner to enter a plea of not guilty and to then insist on strict proof by the Crown of the offence charged. Likewise, it was open to the Commissioner to challenge the constitutional validity of s. 36(3) of the *Fisheries Act* and to argue all the legal defences that counsel saw fit to raise, as occurred. The case was thus vigorously fought, as the record amply shows, on every conceivable issue which legal ingenuity could devise. Having taken that course, it hardly seems fitting that the Commissioner should now, nevertheless, be able to escape the full rigour of the law.

[para44] In the circumstances, the fine of $49,000 does not fit either the offence or the offender, who comes before the courts not as an unlettered pauper but as the representative head of a government which is possessed of powers and resources well beyond those of any individual, and most private corporations or municipal institutions, in the Northwest Territories.

Sentencing Principles

[para45] Since the sentence is not a fit one, in all the circumstances, it must be varied accordingly, within the limits prescribed by the *Fisheries Act*. To that end, consideration must be given afresh to the applicable sentencing principles as argued on this appeal.

1. Protection of the public

[para46] The anomalous position of the Commissioner as an offender in a purely nominal sense who merely represents the government (and the particular officials) responsible for the offence suggests that whatever sanction the Court is to impose must be one which will be clearly seen by the public as more than a mild reprimand and certainly not as condonation. The public deserves to have its laws respected by its governments, and their officials, who owe us all no less than that. If it takes a prosecution and a sentence to bring this about, then so be it. In this sense, the Court is duty bound to act to protect the public, so far as necessary and within the Court's powers, from the actions (or inaction) of governments or officials who flout the law. They must not be allowed to do so with impunity.

2. Denunciation and deterrence

[para47] The sentencing judge recognized and applied these principles. Both parties are in agreement that these are the primary principles to be applied in sentencing in this case. They disagree only as to the manner of their application.

[para48] For the Commissioner, it is contended that the conviction is sufficient in itself by way of denunciation and deterrence. After all, the penalty for a second offence could be much more severe than that for a first offence, as in this case. The conviction has the effect of hereafter exposing the offender to a much higher scale of punishment.

[para49] It is the Crown's position that a much more significant sentence, in terms which will come widely to public attention as judicial condemnation of the offence, is required in all the circumstances of this case if the decision of the Court is to be respected.

3. Gravity and magnitude of the offence

[para50] As already noted, the public through Parliament recognized the potential gravity of violations of s. 36(3) of the *Fisheries Act* when it substantially increased the scale of penalties for such violations in 1991, indeed only six months before the offence took place. The ridiculously small scale of those penalties before then was an open invitation to offenders to look upon them as no more than "the price of doing business as usual".

[para51] The actual effect of the offence on the environment at Koojesse Inlet is not known, although it is said that some studies show that it had minimal impact. It is argued on behalf of the Commissioner that the contents of the lagoon which reached the sea were largely quite rapidly biodegradable. Those contents were not confined to organic material normally found in human sewage, however, since the evidence shows that the lagoon also contained "municipal waste", which in today's world would include the chemicals in detergents and other items of common use.

[para52] In terms of potential harm, as recognized in 1989 by the statement in the Legislative Assembly, and in terms of sheer volume, this was a major violation of s. 36(3) of the *Fisheries Act*. And when due account is also taken of the identity and public status of the offender, that aspect of the matter is placed beyond all question.

4. Aggravating and mitigating factors

[para53] The lack of due diligence shown by the offender is the gravamen of the offence and is, therefore, not in itself an aggravating factor. What does aggravate the seriousness of the offence is the history of previous incidents of failure of the lagoon, well-known to the offender before the offence occurred; it is against this notorious background that the seriousness of the offence is to be measured, in terms of aggravation.

[para54] It is furthermore an aggravating feature that the offender stood in a position of special public responsibility towards the environment, as acknowledged in the statement to the Legislative Assembly in 1989, even if the *Fisheries Act* lay outside the sphere of that responsibility. We all know, today, that the environment is a seamless web of which no part is disconnected from the rest.

[para55] There are no mitigating factors revealed in the evidence before the Court, apart from the absence of evidence that the contents of the lagoon were more than just potentially harmful in the longterm. The plea that a third party contributed to the offence remains unsubstantiated. On the evidence, whatever was done by that third party, it remained the Commissioner's responsibility to

exercise due diligence to prevent the offence from occurring; and that was not done. Nor was the unusually warm weather a mitigating consideration. Due diligence required that it be reckoned with; and it was not. As for the licence, it cannot be regarded as a mitigating circumstance for the reasons already mentioned. Finally, the Commissioner's arguments at trial and on this appeal, that the provisions of s. 36(3) of the *Fisheries Act* are unconstitutional, lack all merit in support of a plea of mistake as to the law made in good faith. The Commissioner is not to be equated with a simple municipal garbage collector.

5. Proportionality

[para56] Taking all these factors and circumstances into account, I am driven to conclude that both the fine and the payment order must be varied, notwithstanding the evident pains taken by the very experienced sentencing judge in crafting the penalties which he imposed.

[para57] In reaching that conclusion, I have not ignored the fact that some $300,000 was expended by the Commissioner to restore the lagoon to operating condition (and, presumably, the condition to which it should have been brought before the offence occurred, so as to prevent its occurrence). I assume that this includes clean-up costs. The lagoon was at all times the property of the Commissioner, who remained in control of it and continued to operate it after the restoration. That amount is therefore not to be regarded as a part or in mitigation of any penalty to be judicially imposed. It does, however, reflect to some degree on the lack of due proportionality between the offence and the offender, on the one hand, and the sentence under appeal on the other hand.

The Sentence

[para58] Before the sentencing judge, Crown counsel took the position that a publication order should be made pursuant to s. 79.2(f) of the *Fisheries Act*. This was opposed on behalf of the Commissioner. In the result, no such order was made; and the Crown has chosen not to pursue the point in this appeal. I therefore do not include any such order in the sentence of the Court.

[para59] The payment order is varied as follows:

1. it shall be in the amount of $100,000 in lieu of the $40,000 in the sentence under appeal;

2. the $100,000 shall be paid no later than forthwith upon expiry of the period within which this sentence may be appealed;

3. it shall be paid to Her Majesty the Queen in right of Canada;
4. it shall be used by Her Majesty to promote the conservation and protection of fish or fish habitat in the waters of or adjacent to the Northwest Territories;

5. such use may include the design, construction or operation of an aquarium, at Iqaluit, whether or not in conjunction with other concerned government agencies or individuals, as the Department of Environment of Canada may approve; and

6. such use may include the funding or conduct of programs approved by the Department of Environment of Canada related to sewage and waste treatment and disposal, so as to meet the requirements of the *Fisheries Act* in relation to the Northwest Territories.

[para60] The fine is varied to a total of $100,000 which includes $1,000 a day for the period of seepage from and including June 3rd 1991 to and including June 10th 1991. The Commissioner shall have until the expiry of the period of any appeal from this sentence within which to pay the fine in the usual manner.

[para61] The total penalty imposed under the *Fisheries Act* is therefore increased from $89,000 to $200,000.

Costs

[para62] Section 826 of the *Criminal Code* makes the following provision for an award of costs:

> 826. Where an appeal is heard and determined or is abandoned or is dismissed for want of prosecution, the appeal court may make any order with respect to costs that it considers just and reasonable.

[para63] The fact that the Commissioner was a representative of the Crown, assuming that to be the case for purposes of argument, does not prevent an award of costs being made against him: *R.* v. *Ouellette*, [1980] 1 S.C.R. 568, 52 C.C.C. (2d) 346, 15 C.R. (3d) 372. And see *R.* v. *Pawlowski* (1993), 20 C.R. (4th) 233 (Ont. C.A.).

[para64] This is clearly not a case for an award of costs against the Crown as prosecutor. The question remains as to whether any costs are to be awarded against the Commissioner.

1. The application to adjourn the appeal hearing

[para65] On April 8th 1994 I directed that costs should be addressed by counsel at the conclusion of these appeal proceedings. That has now been done. On that occasion, I had dismissed the Commissioner's application to adjourn the hearing of his conviction appeal sine die.

[para66] That application was supported by an affidavit of the then Acting Deputy Minister of Justice of the Northwest Territories, in which he alleged that differing standards for the treatment of municipal sewage effluent were being applied by the federal Department of Environment, on one hand, and the federal Department of Indian Affairs and Northern Development, on the other, in the exercise of their respective authorities under the *Fisheries Act* and the *Northern Inland Waters Act*. As a consequence, it was said that, depending on the appropriate standard, the Government of the Northwest Territories may be required to incur considerable capital expenditures to upgrade municipal sewage treatment systems on pain of further prosecution under the *Fisheries Act*.

[para67] The affidavit went on to say that, as a result of these public policy concerns, the Minister of Justice of the Northwest Territories had entered into correspondence with the Deputy

Prime Minister and Minister of Environment of Canada to attempt to resolve these concerns by meetings of their officials, it being the position of the Territorial Minister that, if satisfactory progress could be made (at the policy level) between the two governments, then the Commissioner would abandon his appeal. No mention was made, in the affidavit, of the Crown's cross-appeal against sentence. Nor was any mention made of the fact that the Commissioner had not paid any part of the penalty imposed upon him by the judge of the Territorial Court, no attempt having been made on behalf of the Commissioner to obtain a judicial stay of execution in that respect.

[para68] Crown counsel submits that the grounds for that adjournment were inappropriate in the circumstances; it appeared, indeed, that what was being attempted was nothing short of political interference with the Court's conduct of the appeal. I find this to be no more than a reasonable characterization of the situation. An award of costs of the day, in an amount to compensate the Crown for the need to attend and appose the application, is in my view entirely justifiable. Moreover, to mark the Court's disapproval of the application, the amount of those costs should be fixed in an amount which may serve to impress on those responsible for it that they should avoid any repetition of the type of conduct there shown.

[para69] I therefore fix the amount of the costs to be paid by the Commissioner to the Crown, in respect of the application to adjourn, in the amount of $10,000.

2. The conviction appeal

[para70] With the sole exception of the factual issue of whether the offence commenced on June 1st 1991 or on June 2nd 1991, as to which the Commissioner's appeal against the conviction was technically successful, the remaining issues raised by him in that appeal were resolved in favour of the respondent Crown.

[para71] The Commissioner says that this was not a "test case" and that no oblique motive existed in his conduct of the appeal. The Crown submission is that the contrary is the case. I agree with counsel for the Commissioner that the Court should not be quick to find an oblique motive merely because the Commissioner's cause was vigorously pursued, even if in the end it was all for naught. The "test case" line of authority is inapplicable, it seems to me, where the prosecuting Crown has been successful.

[para72] Nor do I find merit in the Crown's contention that the Commissioner's constitutional challenge to s. 36(3) of the *Fisheries Act* placed the administration and enforcement of that provision in jeopardy across Canada. The Territorial Court has no jurisdiction beyond the Northwest Territories any more than this Court. Had either court ruled against the Crown on that challenge, there was still another level of appeal before it could become a national issue with legal consequences of a binding character. There were arguable contentions put before both the Territorial Court and this Court on the matter. That those contentions failed on both occasions is not, in itself, a ground for the award of costs against the unsuccessful contender.

[para73] Nevertheless, the record shows that the Commissioner did not hesitate to "pull out all the stops" in the course of both the trial and the appeal, forcing the Crown to go the limit, for its

part. It was of course the Commissioner's legal right to do so. And the Deputy Minister's affidavit sheds some light on the reasons for that course being taken. A financial consequence far greater than the penalty which could properly be imposed in this case was clearly dictating the Commissioner's response to the prosecution, quite apart from the political consequences which might flow from a conviction.

[para74] In conclusion, I decline to make an award of costs against the Commissioner in respect of either the trial or the appeals to this Court, other than that above mentioned. These costs shall be paid contemporaneously with the fine.

[para75] Counsel on both sides are to be complimented upon the completeness and thoroughness of their submissions, for which I express my appreciation.

BRITISH COLUMBIA SUPREME COURT

[Indexed as: Standard Trust Co. (In liquidation) v. Lindsay Holdings Ltd.]

Between Standard Trust Company, in liquidation, Petitioner, and Lindsay Holdings Ltd., John Richard Ostaf, ACC Auto Care Centre, Inc., Coast Hudson Ltd. and Royal Bank of Canada, Respondents

Thackray J.

Vancouver, November 22, 1994

***Fisheries Act*, R.S.C. 1985, c. F-14, ss 38(4), 38(6), 42(1), 42(2) – application for court order appointing receiver and manager – proposed order contained limitations on environmental liability – order would conflict with some provisions of the *Fisheries Act* – order not granted**

Receivership – environmental laws apply to court appointed receiver

Summary: The petitioner applied for the appointment without security of a receiver and manager of certain lands and businesses in Richmond, B.C. The property of concern was an automotive-oriented shopping mall, which contained some petroleum pollution. Richmond is bounded on two sides by the Fraser River which is a spawning ground and migration route for salmon. The issue was whether the order appointing the proposed receiver should protect the receiver from legislation that creates liability for the costs of environmental protection and environmental damage.

The learned justice rejected the petitioner's argument that legislation must specifically state that receivers' liability is unlimited. On the contrary, it is more logical for legislation to exclude receivers' liability if that is the intention. Further, the court rejected the petitioner's argument that authority for the exemption requested could be found in the courts own rules, the *Law and Equity Act* or its inherent jurisdiction. None of these sources of judicial power allow a court to ignore the facts that receivers do have environmental obligations under law and courts do not have jurisdiction to rewrite the statutes that create such obligations. The definitions of "person" in environmental legislation such as the *Fisheries Act* give effect to the intention to achieve broad application of environmental protection legislation. To implement the proposed order would contradict some provisions of the *Fisheries Act* concerning the direction to take remedial measures (s. 38(6)) and the provision establishing joint and several liability for certain public costs (s. 42(1)).

In addition, the court rejected the petitioner's argument that as an officer of the court, it should be shielded from liability under environmental laws in the same manner as the court itself. A receiver and manager is a commercial entity and as such is different from the court.

Held: The portions of the proposed order set out in the judgement dealing with environmental liability were denied.

REASONS/MOTIF:

F.L. Lamer, Counsel for the Petitioner
G. Burnyeat, Counsel for Lindsay Holdings Ltd. and John Richard
G. Donegan, Q.C., Counsel for the Attorney General of Canada
D. Doyle, Attorney General of British Columbia

[para1] THACKRAY J.:-- The petitioner applied for the appointment, without security, of Price Waterhouse Limited as receiver and manager of certain lands, buildings, leases, rents and business. The property is an automotive-oriented shopping mall in Richmond, British Columbia. The contentious issue is the desire of the proposed receiver to have protection from legislation that creates liability for the costs of environmental protection and for environmental damage.

[para2] Richmond is bounded north and south by the Fraser River which is a spawning ground and migration route of numerous specie of salmon. Seepage of petroleum products or spillage that enters the storm drainage system could find its way into the river.

[para3] Opposition to the liability provisions was thought by the Attorneys General to be hypothetical. However, such might not be the case. Counsel for the petitioner indicated that there is some pollution, although the extent was not disclosed.

[para4] The controversial sections of the proposed order read as follows:

> AND THIS COURT FURTHER ORDERS that the Receiver and Manager (which term shall herein include its officers, directors, employees, agents, consultants, principals and solicitors, as well as any party substituted for Price Waterhouse Limited and in the limited case of the liability contemplated by subparagraph (b) below, extends to any individual including any agents, employees, former employees and officers of the Respondent Lindsay Holdings Ltd. that the Receiver and Manager may hereafter employ or retain from time to time) shall not be personally liable either directly or vicariously under any Environmental Regulations in respect of any environmental condition which arose, or any environmental damage which occurred either:
>
> (a) before the Receiver and Manager's appointment hereunder;
>
> (b) after the Receiver and Manager's appointment and prior to its discharge hereunder; or
>
> (c) after the discharge of the Receiver and Manager,
>
> unless it can be demonstrated by the regulatory authority responsible for the administration of the applicable Environmental Regulations ("Environmental Regulator") that the condition arose or the damage occurred after the appointment of the Receiver and Manager and prior to its discharge and as a result of the Receiver and Manager's failure to comply with any written order or instruction issued by the Environmental Regulator and that the

Receiver and Manager has been provided sufficient funding or assurance of funding specifically designated for compliance with such order or instruction.

AND THIS COURT FURTHER ORDERS that the Receiver and Manager shall undertake 0such environmental preservation and environmental maintenance and monitoring of the Property as the Environmental Regulator reasonably advises the Receiver and Manager should be undertaken by way of written order or instruction by the Environmental Regulator and for which the Receiver and Manager has or receives funding or is provided with assurances of funding which are acceptable to the Receiver and Manager and which funds are specifically designated for compliance with such order or instruction.

AND THIS COURT FURTHER ORDERS that nothing in this order shall compel the Petitioner or make the Petitioner liable to provide the funding required for compliance with any written order made by the Environmental Regulator.
AND THIS COURT FURTHER ORDERS that the term of this order sets out the only requirement of:

(a) the Receiver and Manager, and

(b) any individuals including agents, employees, former employees and officers of Lindsay Holdings Ltd. that the Receiver and Manager shall employ or retain from time to time ("Employees") for such period as such person or persons is employed by the Receiver and Manager

with respect to compliance with and liabilities arising under the Environmental Regulations such that, except as expressly provided to the contrary herein, nothing herein contained shall vest in the Receiver and Manager or Employees the ownership, control, possession or management nor require the Receiver and Manager or Employees to take possession, control or manage the Property or a part thereof which may be a pollutant or contaminant or cause or contribute to a discharge, release or deposit or a substance contrary to any Environmental Regulations which may have application in any jurisdiction in which any of the Property is situate.

AND THIS COURT FURTHER ORDERS that excepting liability for acts of willful misconduct or gross negligence on the part of the officers, directors and direct employees of Price Waterhouse Limited in its personal capacity and not in its capacity as Receiver and Manager, any liability of the Receiver and Manager whatsoever, including without limitation arising under Environmental Regulations resulting out of or from its appointment in the exercise of its powers hereunder shall be limited in the aggregate to the amount received by the Receiver and Manager from the disposition of the Property or any part thereof after deductions for payment of both the fees, disbursements and expenditures of every nature and kind incurred by the Receiver and Manager and its counsel and any monies borrowed by the Receiver and Manager pursuant to this Order.

[para5] The Attorneys General oppose these limitations. They submit that the court does not have jurisdiction to limit a receiver manager's liability as proposed. The petitioner framed the issue as follows:

> The issue in this case is whether a court can, under Rule 47 and Section 36 of the *Law and Equity Act*, R.S.B.C. 1979, c. 224, limit the civil and penal liability of a court appointed receiver under the *Fisheries Act*, R.S.C. 1985, c. F-14, the *Canadian Environmental Protection Act*, R.S.C. 1985, c. C-16, the *Transportation of Dangerous Goods Act*, R.S.C. 1985, c. T-19, the *Navigable Waters Protection Act*, R.S.C. 1985, c. C-19, the *Canada Water Act*, R.S.C. 1970, c. N-22, the *Waste Management Act*, S.B.C. 1982, c. 41 the *Environment Management Act*, S.B.C. 1981, c. 14, the *Municipal Act*, R.S.B.C. 1979, c. 290, the *Transportation of Dangerous Goods Act*, S.B.C. 1985, c. 17, as amended, or the regulations thereunder or any other existing legislation, federal, provincial or otherwise relating in whole or in part to the protection or the enhancement of the environment, transportation of goods, occupational safety, product liability, public health and public safety (collectively, "Environmental Laws"), which may have application to the property which is the subject matter of the order being requested from the court.
>
> [...]
>
> ... the issues raised by the Attorney General of British Columbia and the Attorney General of Canada in relation to the request for court ordered limitation on environmental liability are as follows:
>
> > (a) Is a court appointed receiver, in its capacity as an officer of the court acting in compliance with the terms and conditions of its appointment, a "person" to which environmental laws apply?
> >
> > (b) Even if the environmental laws are capable of encompassing court appointed receivers in the absence of court ordered limitation on liability, does the wording of any environmental law restrict, either specifically or by necessary implication, the power of a court to appoint a receiver "on terms and conditions the court thinks just"?

SUBMISSIONS OF THE PETITIONER

[para6] The petitioner submitted that a court appointed receiver is an officer of the court and not a person to which environmental laws apply. Accordingly, the court can "clarify" a receiver's duties and powers. The petitioner noted that the word "person" as defined in the *Interpretation Act*, R.S.C. 1985 c. I-23, and in the *Interpretation Act*, R.S.B.C. 1979, c. 206, does not mention an officer of the court.

[para7] Counsel for the petitioner contended that who or what is encompassed by "person" is dependent on the purpose and meaning of any specific legislative enactment. He said that the starting point in any analysis of the issue is to determine the legal status of a court appointed receiver. He cited *Parsons* v. *The Sovereign Bank of Canada*, [1913] A.C. 160 (P.C.) at page 167:

> A receiver and manager appointed, as were those in the present case, is the agent neither of the debenture-holders, whose credit he cannot pledge, nor of the company, which cannot control him. He is an officer of the Court put in to discharge certain duties prescribed by the order appointing him; duties which in the present case extended to the continuation and management of the business. The company remains in existence, but it has lost its title to control its assets and affairs, with the result that some of its contracts, such as those in which it stands to an employee in the relation of master to servant, being of a personal nature, may, in certain cases, be determined by the mere change in possession, and the company may be liable for a breach.

[para8] The petitioner further submitted that as an officer of the court the receiver holds the property which is the subject matter of the receivership on behalf of the court and not on behalf of any secured creditor. He concluded that a receiver's, "obligations should be limited to the resources available to it". He continued:

> ... the use of the word "person" in an Environmental Law (or indeed any other statute) cannot be interpreted to cover a court appointed receiver if it purports to impose unlimited liability on such a "person". This is essentially the reasoning used by Chief Justice Hickman in *Bank of Montreal* v. *Lundrigans Ltd.* (1992), 12 C.B.R. (3d) 170 (Nfld. S.C.(T.D.)) to rule that such an unlimited liability cannot be imposed on a court appointed receiver. Chief Justice Hickman found that none of the environmental legislation referred to him (including federal legislation) "provides that a receiver and manager shall be personally liable for any environmental contaminant found upon the property that comes into its or his hands", at pages 179-80:
>
> [. . .]
>
> In my view, the appointment of a receiver and manager by the court, and his subsequent assumption of control of all or some of a debtor's assets, does not, under existing legislation, render him liable to pay money or perform work ordered by environmental authorities in excess of the value of or moneys received from the sale of the individual asset which caused the environmental damage. Legislation intended to impose unlimited liability on a receiver and manager would have to say so in clear and unmistakable language, which is not the case with existing environmental legislation.
>
> The Petitioner submits that this rule of construction is valid with respect to any legislation which could potentially cover court appointed receivers. This rule of construction applies even more forcefully to the Environmental Laws in view of the basis upon which liability is imposed, i.e. mere possession and control.
>
> It would be irrational to impose such unlimited liability on a "person" who does not have the same rights, powers and obligations as either a natural person, a corporation or even a "corporation sole" (i.e. a government). In fact, a court appointed receiver is merely the corporate conduit of a court ordered mandate because, in its capacity as a court officer, it is the person through which the court has elected to act. None of the Environmental Laws can be interpreted as imposing liability on the courts and, as a result, no liability can be imposed

> under these statutes to the court's duly appointed officers. It is for this reason that a court appointed receiver cannot be considered to be a "person" within the meaning of the Environmental Laws. It is the Petitioner's respectful submission that, as a result, none of the Environmental Laws specifically imposed environmental obligations on court appointed receivers.

[para9] Counsel for the petitioner canvassed whether environmental legislation is intended to restrict the powers of the court under Supreme Court Rule 47 and section 36 of the *Law and Equity Act*. He said that Chief Justice Hickman in *Lundrigans* (also reported at (1992) 92 D.L.R. (4th) 554 (N.S.S.C.)) held that the court has the inherent jurisdiction to make an order such as the one proposed.

[para10] Finally, counsel for the petitioner said that the appointment of a receiver cannot be achieved if Price Waterhouse may incur unlimited liability. He concluded as follows:

> For these reasons, the petitioner submits that the order sought with respect to environmental liability is merely declarative in nature and that, even if it isn't, the court has jurisdiction to provide the requested limitation on liability in order to ensure that it is capable of finding a receiver who will be able and willing to perform its court ordered mandate.

JUDGMENT

[para11] I do not accept the proposition that legislation must specifically state that there is unlimited liability upon receivers. It follows that I do not agree with Hickman C.J. in *Lundrigans* when he said that, "Legislation intended to impose unlimited liability on a receiver and manager would have to say so in clear and unmistakable language...". Similarly, I reject the submission of the petitioner that the word "person" in statutes "cannot be interpreted to cover a court appointed receiver if it purports to impose unlimited liability on such a 'person'".

[para12] The *British Columbia Interpretation Act* defines "person" as including, "a corporation, partnership or party, and the personal or other legal representatives of a person to whom the context can apply according to law." The federal *Interpretation Act* defines person as including a corporation. It must therefore be concluded that legislators, in using the word "person" in various statutes to describe those upon whom liability for environmental damage attaches, intended to provide an expansive definition, one that should not be limited by the courts.

[para13] Federal and provincial legislation create liability for environmental damage. No federal legislation authorizes the court to limit liability in the manner sought by the petitioner. For example, the *Fisheries Act*, R.S.C. 1985, c. F-14, s. 42(4) which provides that, "The liability of any person described in paragraph (1)(a) is absolute and does not depend on proof of fault or negligence ...". Paragraph (1)(a) defines "any person" as anyone who at any material time owned the deleterious substance or had charge, management or control thereof.

[para14] Rather than suggest that the legislation must specifically include entities not intended to be made liable, the more logical approach would be to expect legislation to exclude those not liable. This is precisely the approach taken by Parliament with respect to trustees in bankruptcy.

Under a recent amendment to the *Bankruptcy and Insolvency Act*, R.S.C. 1992, c. 26, s. 14.06, the potential environmental liability of a trustee has been expressly limited. No similar limitation is given to receivers in any legislation and accordingly I conclude that the legislators intended them to fall within the ambit of environmental legislation.

[para15] To make the order requested the court would have to find jurisdiction within its own Rules, the *Law and Equity Act* or its inherent jurisdiction. Rule 47 provides that the court may appoint a receiver "either unconditionally or on terms ...". *The Law and Equity Act* empowers the court to appoint a receiver and the order may be made "on terms and conditions that the court thinks just." Neither of these, in my opinion, empowers the court to impose conditions that conflict with statutory duties, rights or liabilities.

[para16] Counsel for the petitioner submitted that the inherent jurisdiction of the court will suffice. He contended that Chief Justice Hickman in *Lundrigans* was correct in relying upon the inherent jurisdiction of the court in limiting the liability of a receiver under environmental laws. However, I must point out that Hickman C.J. stated that while the court had the inherent jurisdiction to act, he also acknowledged that any order must be made "in accordance with existing laws ... ".

[para17] The petitioner referred to I.H. Jacobs, The Inherent Jurisdiction of the Court (1970), 23 Current Legal Problems 23 at pp. 27-28:

> The jurisdiction which is inherent in a superior court of law is that which enables it to fulfill itself as a court of law. The juridical basis of this jurisdiction is therefore the authority of the judiciary to uphold, to protect and to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner.

The petitioner contended that, "the inherent jurisdiction of the court is the jurisdiction to grant such orders as may be necessary in order to prevent ... the law from being stultified and in order to ensure that superior courts have the procedural powers necessary to accomplish their mandate to uphold the law." However, regardless of the jurisdictional foundation, a court may only interpret legislation, not amend it. If the legislation clearly attaches liability upon a receiver then, for the court to acknowledge such, is not a "stultification" of the law.

[para18] I am of the opinion that the various statutes defining the liable entity as a "person" are clear and unambiguous. I agree with counsel for the petitioner who said:

> The environmental laws impose liability on the basis of the notion of "possession and control", as opposed to the notion of any wrongdoing on the part of a "person". Under the environmental laws, there is no middle ground in liability: if an entity is a "person" in "possession or control" under the environmental laws, it is fully and immediately liable to comply with the obligation set out in the environmental laws ...".

[para19] In *R.* v. *British Columbia* (1992), 66 B.C.L.R. (2d) 84 (B.C.S.C.) the court specifically noted, "that the word 'person' is fundamental to the framework of the [*Fisheries*] *Act*." Shaw J. said

that the scheme of the *Fisheries Act* is meant to give far-reaching protection to fisheries. He quoted Nemetz C.J.B.C. in *R.* v. *Richmond*, [1984] 4 W.W.R. 191, 4 D.L.R. (4th) 189 (B.C.C.A.) at 192:

> In the first place, I look to the entire scheme of the *Act*. I think it is only common sense that Parliament in providing for the protection of waters from pollution intended that that should apply to all persons in Canada and could not, unless there was some specific language, exclude a municipal corporation.

[para20] The petitioner said that the courts have indicated that environmental laws should be "observed to the extent possible under the circumstances." Consequently, under its inherent jurisdiction, the courts have been imposing some environmental obligations on receivers "which they would not otherwise have." Therefore, according to the petitioner, "courts may grant complete immunity to a court officer such as a receiver or a trustee in bankruptcy."

[para21] There are two assumptions in this argument. The first is that receivers have no obligations under environmental legislation. The second is that if the court has the power to impose environmental responsibilities upon receivers then it has the power to render immunity from all environmental obligations. I am of the opinion that receivers do have environmental obligations and that the court does not have the jurisdiction to either tamper with or emasculate legislation creating such obligations.

[para22] The petitioner submitted that, "None of the environmental laws can be interpreted as imposing liability on the courts and, as a result, no liability can be imposed under these statutes to the court's duly appointed officers." Implicit in this submission is the assumption that an officer of the court enjoys the same immunity from liability as the court itself. I do not agree with that proposition. Taken to the extreme, such reasoning inexorably leads to the conclusion that, regardless of negligence, a court appointed officer may avoid liability simply because of the source of the appointment.

[para23] In my opinion the purpose of designating individuals as officers of the court is not to shield them from liability but to impose upon them obligations for which they will be accountable. As early as the Middle Ages the court held a disciplinary jurisdiction over lawyers because they were officers of the court: see W.S. Holdsworth, *A History of English Law, 3d,* vol.III (London: Methuen, 1923) at 392.

[para24] There are many categories of people who are "officers of the court", of which a receiver manager is one: see *Kerr on Receivers and Administrators* (London: Sweet & Maxwell, 1989) at 131. However, a receiver is obviously different from the court itself. A receiver is a commercial entity which takes on business responsibilities for financial gain. As such its potential liability is different from that of the court. As F. Bennett notes in *Receiverships* (Toronto: Carswell, 1985) at 118:

> Notwithstanding that the receiver and manager is an officer of the court, [its] fiduciary duty to all extends to a standard of care in the running of the business comparable to the "reasonable care, supervision and control as an ordinary [person] would give to the business

> were it his own" ... Where [it] fails to provide such a standard of care, [it] may be liable for [its] negligence.

[para25] Although Bennett's comments are in relation to a common law duty they are equally applicable, if not more so, to liability for a breach of a statutory duty.

[para26] *Re Lamford Products Ltd.* (1991), 63 B.C.L.R. (2d)1388 (B.C.S.C.) is relied upon by the petitioner. A pollution abatement order was issued on October 18, 1990. Lamford Forest Products Ltd. had made a voluntary assignment into bankruptcy on October 11, 1990. In all likelihood this was not known by the Regional Waste Manager when the abatement order was made. In any event, the order was made against Lamford, not against the official receiver.

[para27] Taking those circumstances into account, Mr. Justice Harvey made the following observation regarding the potential liability of a trustee in bankruptcy (at 392):

> ... I do not think that s. 71(2) imposes personal liability on the trustee in bankruptcy for the remediation of the Sooke site. In the same way that a trustee does not become personally responsible for any other debts of the bankrupt, the trustee cannot be held personally liable for the costs of cleanup beyond the funds realizable from the estate."

Contrary to the petitioner's submissions, these comments do not, in my opinion, assist in the resolution of the case at bar. They relate to the scope of s. 71(2) of the *Bankruptcy Act*, and not to the potential liability of trustees under other legislation. This was acknowledged by Harvey J. in the next paragraph where he stated (at 392):

> However, with regard to the disposal of the P.C.B.s stored on the site, the trustee could fall within the scope of other legislation, such as s. 36 of the *Canadian Environmental Protection Act*, S.C. 1988, c. 22; ss. 4 and 5 of the *Transportation of Dangerous Goods Act*, R.S.C. 1985, c. T-19; s. 9 of the *Canada Water Act*, R.S.C. 1985, c. C-11; s. 35 of the *Fisheries Act*, R.S.C. 1985, c. F-14; and s. 3.1 of the *Waste Management Act*. Since there has not yet been any question of the violation of these statutes, I will refrain from commenting on a trustee's potential liability under them.

[para28] Nevertheless, I am not overlooking the comments in Lamford at page 396:

> The balancing of values in this case falls in favour of protecting the health and safety of society over the rights of creditors, as it did in the *Bulora* and the *Panamericana* case, but there is also a need in modern society for trustees to take on the duty of winding up insolvent estates. The evidence before me indicates that no trustee can be found who will take on the bankruptcy of Lamford without a guarantee that he or she will be entitled to trustee's fees to be deducted from the amount paid out under the order, and will have no personal liability for the costs of cleanup of the contaminated site ...

I understand these concerns. They were echoed by counsel for the petitioner herein. However, they cannot override the intention of the legislation. If receivers are to be protected to the extent of trustees in bankruptcy, or to a greater or lesser extent, that obligation falls upon the legislators.

[para29] The proposed indemnity sections of the order not only provide indemnity to the receiver, but "rewrite" environmental legislation. So as not to expand these reasons immeasurably, I will detail only one example. Section 38(4) of the *Fisheries Act* provides that where there is a deposit of deleterious substance in water frequented by fish, or an imminent danger thereof, any person who owns or has charge, management or control of the substance shall report such an occurrence.

[para30] Section 38(6) states that where an inspector is satisfied that there is such an occurrence, the person who has management or control of the substance may be directed to take remedial measures. Section 42(1) makes the person described in 38(4) jointly and severally liable for any costs incurred by the authorities in either preventing, remedying or mitigating the problem.

[para31] In contrast, the proposed order provides that a receiver shall not be liable either directly or vicariously under any environmental regulation either prior to or after its discharge, or during its tenure, "unless it can be demonstrated" by the authorities that the condition arose during the tenure "and as a result of the receiver and manager's failure to comply with any written order or instruction issued by the Environmental Regulator and that the receiver and manager has been provided sufficient funding or assurance of funding specifically designated for compliance ith such order or instruction."

[para32] Such indirect legislative alterations are outside of the jurisdiction of this court. Furthermore, the proposed indemnity sections are in direct contradiction to the unambiguous language of the legislation. In *Baxter Student Housing Ltd.* v. *College Housing Co-operative Ltd.* (1975), 57 D.L.R. (3d) 1, [1976] 1 W.W.R. 1, [1976] 2 S.C.R. 475, Dickson J. in delivering the judgment of the Court said at page 480:

> In my opinion the inherent jurisdiction of the Court of Queen's Bench is not such as to empower a judge of that Court to make an order negating the unambiguous expression of the legislative will.

[para33] This binding principle provides a solid foundation for rejecting the proposed order. In *Lamford*, Harvey J. specifically noted that the order which he was making was, "not in conflict with the federal statute [*the Bankruptcy Act*]."

[para34] The petitioner relies heavily upon *Lundrigans*. However, the primary concern in that case was environmental damage caused prior to the receiver and manager being appointed. At page 175 Chief Justice Hickman said:

> ... the appointment by the court of a receiver and manager does not impose upon such receiver and manager liability for environmental misbehaviour or damages caused by or attributable to an asset or assets owned by a debtor prior to the appointment of such receiver and manager.

Furthermore, the Chief Justice concluded at page 178 as follows:

> ... should the receiver and manager appointed to take over the assets of Lundrigans breach any environmental laws during the discharge of its functions and responsibilities, that such receiver and manager will be answerable for same and subject to any direction given by the appropriate regulatory regime.

[para35] The proposed order in this case goes beyond what was envisioned in *Lundrigans*. It even goes beyond the provisions of the *Bankruptcy and Insolvency Act* wherein the protection to the trustee is given only for the period outside the trustee's tenure.

[para36] The petitioner asserts that it, "is merely attempting to limit the liability of Price Waterhouse so as to ensure that it is willing to act in a manner that will maximize the value of the collateral." This being so, the risk of being required to provide compensation for environmental problems should fall on the persons who stand to gain - namely, the creditors or indeed the receiver - and not the general public. I reject a course that will protect creditors and their agents at the risk of the public losing the protection of environmental legislation.

[para37] Protection of the receiver as sought represents a potential encouragement to creditors to have a receiver appointed to improve the creditors' position. It was suggested by the Attorney General for Canada that there may be answers to the liability potential without court involvement. It may be that receivers should require suitable indemnity from creditors applying for the appointment of a receiver.

[para38] Those portions of the proposed order set forth earlier in these reasons are denied.